84-787

Office - Supreme Court, U.S.
FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

GARO LAUDERBACK,
*Petitioner,*

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STEPHEN F. AVERY
CORNWALL, AVERY, BJORNSTAD & SCOTT
407 Grand Avenue
Spencer, Iowa 51301-0346
(712) 262-1630

*Attorneys for Petitioner*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

70 pp

## BASIC QUESTION

Can a national telecast portray a non-charged private individual as a criminal and claim the defense of opinion, not fact.

## SUB QUESTIONS PRESENTED

I. In a libel case does the court commit error in focusing on the publisher's state of mind as opposed to the information given to the reader and listener when determining whether the defense of fair comment exists?

II. Does the common law privilege of fair comment exist for ABC when its telecast "20/20 News" implies the existence of undisclosed defamatory facts which form the basis of the theme of the telecast?

III. What effect does the actual malice standard expressed in *New York Times v. Sullivan* have on the common law privilege of fair comment?

IV. Should motions for summary judgments in libel actions be reviewed in a light different from motions for summary judgments in other damage actions?

V. When the telecast "20/20 News" portrayed Garo Lauderback as a criminal and ABC was notified prior to the telecast that the county attorney did not intend to prosecute Lauderback out of the "sting" tape, is there sufficient proof of possible malice to defeat a motion for summary judgment?

VI. Where a statement may have been understood by the average viewer to be either defamatory or non-defamatory, should the issue as to whether it is fact or opinion be left to the jury's determination?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | iii |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 2 |
| Argument for Allowance of Writ | 5 |
| I. The Eighth Circuit Committed Errors Of Law In Its Resolution Of The Fair Comment/Opinion Privilege Issue | 5 |
| II. Whether The Eighth Circuit Erred In Granting ABC's Motion For Summary Judgment | 10 |
| III. The Eighth Circuit Erred In Holding That The Inferences Or "Sting" Of The Telecast As It Related To Lauderback Was A Protected Expression Of Opinion | 15 |
| Conclusion | 20 |
| Appendix: | |
| A. District Court Order August 1, 1983 | A-1 |
| B. District Court Order September 13, 1983 | A-4 |
| C. Opinion of Eighth Circuit Court of Appeals | A-6 |
| D. Transcript of May 14, 1981, 20/20 telecast | A-17 |

## TABLE OF AUTHORITIES

**Cases:**

Anderson v. Low Rent Housing Com'n, 304 N.W.2d 239 (Iowa 1981) ..... 12

Brown v. Herald Co., 698 F.2d 949 (8th Cir. 1983) ..... 6

Caron v. Bangor Pub. Co., 470 A.2d 782 (Me. 1984) ... 16

Cianci v. New Time Publishing Co., 639 F.2d 54 (2d Cir. 1980) ..... 18

Clark v. American Broadcasting Co., 684 F.2d 1208 (6th Cir. 1982), cert. denied, 103 S.Ct. 1433 (1983) 12

Fitzgerald v. Penthouse, Int'l, Ltd., 639 F.2d 1076 (4th Cir. 1981) ..... 14

Gertz v. Welch, 418 U.S. 323 (1974) ..... 6

Gleichenhause v. Carlyle, 597 P.2d 611 (Kan. 1979) .... 12

Good Gov't Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572 (Cal. 1979), cert. denied, 441 U.S. 961 (1979) ..... 16

Greenbelt Cooperative Pub. Ass'n v. Bressler, 398 U.S. 6 ..... 19

Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977) 18

Hutchinson v. Proxmire, 443 U.S. 111 (1979) ..... 11

Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) ..... 17

Lal v. CBS, 551 F.Supp. 356 (E.D. Pa. 1982)..... 14

Lauderback v. American Broadcasting Companies, 741 F.2d 193 (8th Cir. 1984).....6, 9, 10, 15, 16, 17

Letter Carriers v. Austin, 418 U.S. 264 ..... 18, 19

Lewis v. Time, 710 F.2d 549 (9th Cir. 1983) ..... 7

Lyons v. New Mass Media, Inc., 453 N.E.2d 451 (Mass. 1983) ..... 16

Marchiondo v. New Mexico State Tribune Co., 648 P.2d 321 (N.M. App. 1982) ..... 16

McCarney v. Des Moines Register and Tribune Co., 239 N.W.2d 152 (Iowa 1976) ..... 11

McManus v. Doubleday & Co., 513 F.Supp. 1383 (S.D.N.Y. 1981) ..... 12

Mount v. Sadik, slip. op. (S.D.N.Y. April 10, 1980).... 13

Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass. 1980)..... 16

Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980) ..... 12

Nevada Ind. Broadcasting Corp. v. Allen, 664 P.2d 337 (Nev. 1983)..... 16

New York Times v. Sullivan, 376 U.S. 254 (1964) ..... 6, 9

Pease v. Telegraph Pub. Co., 426 A.2d 463 (N.H. 1982) 16

Pep v. Newsweek, Inc., 553 F.Supp. 1000 (S.D.N.Y. 1983) ..... 12

Renwick v. News and Observer Pub. Co., 304 S.E.2d 593 (N.C. App. 1983) ..... 16

Rinaldi v. Holt Rinehart and Winston, Inc., 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977)..... 18

Rinaldi v. Viking Penguin, 425 N.Y.S.2d 101 (1980).... 13

Treutler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972) 10

Yiamouyiannis v. Consumer's Union, 619 F.2d 932 (2nd Cir.) cert. denied, 449 U.S. 839 (1980) ..... 11, 12

**Miscellaneous:**

W. Prosser, Torts 747-748 (4th ed. 1971) ..... 15

Restatement of the Law of Torts, Second, §566, comment c (1977) ..... 8, 15

Restatement of the Law of Torts, Second, §617, comment a (1977) ..... 14

U. S. Constitution, Amendment I ..... 2, 17

# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

GARO LAUDERBACK,
*Petitioner,*

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

Garo Lauderback petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on August 21, 1984.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 741 F.2d 193. The order of the United States District Court For The Northern District of Iowa-Central Division, Honorable Judge McManus is unreported.

### JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Garo Lauderback filed an action for libel against American Broadcasting Companies, Inc., (ABC) in the United States District Court for the Northern District of Iowa on June 19, 1981. Jurisdiction in that action was based on diversity of citizenship. Defendant ABC moved for summary judgment on January 12, 1983. On August 1, 1983, the district court denied the motion for summary judgment. (Ap. A-1) On September 13, 1983, the district court certified its order for interlocutory appeal. (Ap. A-4) On August 21, 1984, the United States Court of Appeals for the Eighth Circuit reversed the district court's denial of ABC's motion for summary judgment and remanded the case to the district court for proceedings in accordance with the opinion. (Ap. A-6)

This case involves the question of whether ABC is entitled to the protection of the fair comment privilege for a non-public figure and in addition whether the procedure of summary judgment is appropriate on these facts.

On May 14, 1981, ABC broadcast is "20/20 News" television news program. Approximately one-third of that program concerned a criminal investigation concerning insurance fraud, which investigation had been conducted in Emmet County, Iowa.

The insurance investigation in Emmet County, Iowa, arose through the efforts of John Martens, the Emmet County Attorney, who obtained the assistance of ABC to secretly videotape "sting" interviews with insurance agents in northwest Iowa. The pre-taping arrangement between the County Attorney's office and ABC placed no restrictions on ABC as to their use of the secret videotapes which they obtained during the sting operation.

On January 13, 1981, Garo Lauderback answered a request directed to his employer, Michael Crawford, and attempted to sell nursing home insurance to "decoys" Carl and Dagney Matheson, who were portraying potential buyers in their cooperation with the County Attorney's office. This sales presentation by Lauderback was secretly taped by ABC and portions of that secret videotape were reproduced and made a portion of the May 14, 1981, national telecast on "20/20 news."

The producer of the May 14, 1981, telecast and the assistant general counsel for ABC were both informed by Emmet County Attorney John Martens prior to the telecast that Garo Lauderback would not be prosecuted from the sting tape. ABC was informed by Martens that the County Attorney's office was still looking into Lauderback's contact with another Emmet County resident, a Lucy Chalstrom, and the sale to her of a nursing home policy. In addition, ABC was aware that the Iowa Insurance Commissioner was reviewing all agents taped and information obtained during the investigation since the Insurance Commissioner's office was cooperating with County Attorney Martens' investigation. The telecast by ABC pictured Lauderback in his sales presentation made during the "sting" tape. In addition, the telecast contained references to Lauderback and his attempts to determine whether a nursing home policy which he was selling to Lucy Chalstrom would be effective at a local facility. In fact, Lauderback had not contacted the facility's director, but rather the executive secretary for the facility and

thus merely exaggerated during the "sting" tape and had not outright lied. This was known to ABC prior to its telecast and this also was not disclosed to the viewers.

The producer of the telecast did discuss with his assistant Jeffries and reporter Geraldo Rivera removing Lauderback's name and picture from the show prior to airing the telecast on May 14. In addition, the producer discussed with assistant general counsel the removal of Lauderback from the telecast. ABC further received a request from Lauderback and his wife not to include Lauderback in the show after the producer phoned Lauderback to advise him that he had been secretly videotaped on January 13 and that portions of that show were going to be used on a "20/20 News" telecast. Garo Lauderback was never indicted by a grand jury although grand juries are referred to in the telecast. No county attorney's information was ever filed against Garo Lauderback although the county attorney was pictured and referred to in the telecast. The telecast showed various court proceedings and each of the other insurance salespersons who were named or pictured in the telecast were either indicted, charged, or involved in the pleas of guilty pictured in the telecast.

The written transcript of the telecast is attached in the appendix at A-17. The video tape of the telecast is available for viewing by the Court.

The telecast pictured the headline in the local newspaper, The Daily News, which headline read "Emmet Grand Jury Indicts Two Iowa Insurance Agents". While this headline was on the screen, the voice-over is by Geraldo Rivera and he states, "The fact that most policies do not cover extended nursing home care has received some publicity." The next picture on the telecast after Rivera finished that sentence is Garo Lauderback. His picture is on the screen While Geraldo Rivera is stating, "So the agents just say, 'Oh, it's the other guys who are doing the stealing.' " Thereafter, a portion of Garo Lauderback's sting tape is shown on the screen with Garo Lauderback talking. (In the

transcript this is the portion marked "salesman" Ap. A-33).

The telecast pictured the newspaper headline referring to the indictment of two agents. It showed plea bargains, grand jury reporting, the prosecutor, and courtroom scenes. It used such terms as "crook", "liar", "white collar crime", "insurance fraud", "misconduct", unethical", "renegade agents", "dregs of the insurance industry", "illegal conduct", and "stealing".

## ARGUMENT FOR ALLOWANCE OF WRIT

### I. The Eighth Circuit Committed Errors Of Law In Its Resolution Of The Fair Comment/Opinion Privilege Issue.

Defendant American Broadcasting Companies claimed that its broadcast was privileged as a statement of opinion under common law principles and sought a summary judgment on that basis in the U.S. District Court for the Northern District of Iowa. After District Judge Honorable Edward J. McManus denied that motion, the U.S. Court of Appeals for the Eighth Circuit reversed. Any reading of the circuit court's opinion demonstrates that the court committed reversible legal error in three ways. First, the court of appeals erred in its application of the common law of fair comment by confusing the common law with constitutional defamation principles. Second, the court erred in its resolution of the issue of whether the defendant's broadcast implied the existence of undisclosed defamatory facts and thus was not privileged by fair comment. Third, the court erred by applying to a private individual plaintiff the constitutionl actual malice test in its evaluation of the defendant's publication-time state of mind.

#### A. The Court Of Appeals Confused Common Law Fair Comment Principles With The Constitutional Actual Malice Privilege.

The Court of Appeals, while ruling that ABC's statements were entitled to the common law fair comment privilege, stated

that "not all information favorable to the plaintiff need be disclosed as the basis of a published opinion" and cited as support *Brown v. Herald Co.*, 698 F.2d 949 (8th Cir. 1983). *See Lauderback v. American Broadcasting Companies,* No. 741 F.2d 193 (8th Cir. 1984). (Ap. A-6). The court's opinion shows clearly that it confused the fact-opinion issue with that of actual malice. *Brown,* the cited case, merely restates the common view that failure to include in a publication favorable facts about a libel plaintiff does not alone show with convincing clarity the existence of actual malice. But the issue of whether the presentation by the defendant of his publication in a particular manner sheds any light on the publisher's state of mind has nothing to do with whether that publication is, in the first instance, entitled to the common law privilege of fair comment. The fair comment privilege focuses on the information given to the reader and protects statements of opinion only if they are accompanied by a factual presentation sufficient to allow readers to independently reach a judgment as to the credibility of the publisher's opinion. *Gertz v. Welch,* 418 U.S. 323 (1974). The constitutional privilege of actual malice, on the other hand, focuses on the publisher's state of mind and does not concern itself independently with the interpretation of the publication by the reader or the omission of critical facts, except to the extent they demonstrate that state of mind. *Gertz, supra; New York Times v. Sullivan,* 376 U.S. 254 (1964).

This confusion injured the plaintiff. Good faith and lack of recklessness are sufficient to render a publication privileged under the *Sullivan* actual malice test. It is this test which the court of appeals erroneously intertwined with its resolution of the common law fair comment issue. This approach was erroneous for two reasons. First, the fair comment privilege is deserved only if the publication is accurate enough to allow independent reader evaluation. Accuracy, not state of mind, is key. While opinions can never be deemed false, the "facts" on which the opinion is based may be. "(T)he 'facts' on which an opinion is based are either true or false. When they are true,

and when they are stated, the first amendment shields from liability an opinion that arises from them." *Lewis v. Time,* 710 F.2d 549 (9th Cir. 1983). Second, even were state of mind the proper consideration for a fair comment analysis, invoking actual malice would have been improper because the plaintiff is not a public official or public figure.

The court of appeals judged ABC's conduct only by the lesser actual malice standard appropriate for determination of constitutional privilege, and not by the more strict standard required before invocation of the common law fair comment privilege.

### B. The Eighth Circuit Erred In Determining That ABC Was Entitled To The Common Law Fair Comment Privilege.

As the court of appeals judged the defendant's conduct by an incorrect, lesser standard, it is no surprise that its resolution of the fair comment issue was erroneous. If the proper fair comment standards are applied, it is clear that ABC's statements were not entitled to the privilege. ABC's television broadcast did not contain facts sufficient to allow viewers to independently evaluate ABC's expression of its opinion that the plaintiff was among the "flim-flam" insurance men who "tell lies" to cheat the elderly. *See* Transcript of 20/20 Broadcast, (Ap. A-27). The broadcast did not tell viewers that the taped conduct which they witnessed had been reviewed by prosecuting authorities, who had decided that criminal charges were not warranted, although ABC knew this. *See* Order of District Judge Edward J. McManus, No. 1C 81-3031, August 1, 1983. (Ap. A-3) The defendant's broadcast stated broadly, after a discussion of criminal conduct and charges, that the plaintiff was "under formal investigation." (Ap. A-34). Had viewers been informed that this investigation dealt not with the pictured conduct and its criminality in ABC's eyes but rather concerned an apparent good-faith mistake in another matter,

they might have reached a quite different opinion than that expressed by ABC. The average viewer likely would have concluded that the plaintiff was not a shameless crook but rather an honest but relatively less talented salesman. The defendant's broadcast also misrepresented the plaintiff's conduct in trying to determine whether a nursing home policy would be effective at a local facility. The broadcast showed the plaintiff claiming that he had verified the effectiveness of the policy with the facility director and then showed the director denying any knowledge of the plaintiff. (Ap. A-33). In fact, the plaintiff had obtained verification, albeit erroneous, of the plan's effectiveness with the director's executive secretary after waiting unsuccessfully to see the director. Had viewers known that the plaintiff had tried to reach the director and ultimately obtained confirmation from a member of his staff, and had thus merely exaggerated and not boldly lied, they might have reached a very different opinion. Viewers undoubtedly feel more sympathetic to a man frustrated by bureaucracy who ultimately exaggerates than one who creates fiction out of whole cloth.

### C. The Court Of Appeals Misstated The Law Regarding Implication Of Undisclosed Defamatory Facts.

The common law privilege of fair comment is not available to one whose publication implies the existence of further, undisclosed defamatory facts which formed the basis for its stated opinion. Restatement (Second) of Torts §566. The court of appeals effectively destroyed this requirement with one stroke of the pen. While addressing the factual basis issue, the court wrote that, "By its very nature, a media investigation of an industry conveys the message that all negative facts relevant to the topic will be revealed." Lauderback, (Ap. A-15). Thus, the court of appeals made the rather startling pronouncement that no viewer could ever get the impression that a publisher's opinion was based on further defamatory, undisclosed facts. Surely such a pronouncement is not for the court to make.

### D. The Eighth Circuit Erred By Judging The Defendant's Publication State Of Mind By The Actual Malice Standard.

What effect the *Sullivan* decision has on the common law privilege of fair comment has never been resolved by this court. The court did note that the privilege might be unavailable to those who, while setting forth the factual basis for their opinion, act with constitutionally sufficient culpability, i.e. actual malice or negligence. *See Sullivan,* 376 U.S. 254, 292 n.30. Under such a rule of law, one who acted with negligence while setting forth the factual basis for its opinion regarding a private individual's behavior would not be able to invoke the fair comment privilege in states that choose the *Gertz* option. Such a defendant would then be relegated to trying to prove the truth of all of this factual assertions.

The Eighth Circuit considered this issue but determined that the fair comment privilege was not defeated because ABC had not acted with constitutional actual malice. *Lauderback* (Ap. A-11). The court's treatment of the issue was thus erroneous. If constitutional culpability defeats the common law fair comment privilege, then the court should have examined whether ABC's factual statements were made with negligence. There has been no claim that the plaintiff is anything other than a private individual, on whom Iowa law would apparently impose only a duty to demonstrate simple negligence. *See McCarney v. Des Moines Register,* 239 N.W.2d 152 (Iowa 1976) (noting with approval Illinois' adoption of the negligence standards for private individuals). ABC's factual presentation was made negligently, for it knew before the broadcast that the plaintiff faced no criminal charges for the conduct featured on the broadcast. (Ap. A-3, 15). Yet the defendant still stated that the plaintiff was "under formal investigation." (Ap. A-34) The fortuitous, for ABC, fact that the plaintiff was apparently getting an informal look because of an unrelated, good-faith mistake in another matter does not change the fact that the defendant's conduct at

the time of publication was negligent. That being the case, the defendant should not have been allowed to invoke the common law fair comment privilege. Rather, the court should have allowed the jury to interpret what was meant by the statement that the plaintiff was "under formal investigation" and then allow the defendant the chance to prove the truth of that interpretation.

**II. Whether The Eighth Circuit Erred In Granting ABC's Motion For Summary Judgment.**

Judge McManus for the United States District Court for the Northern District of Iowa rejected the ABC's motion for summary judgment in this action, concluding that:

> (d)efendant's motivation for including plaintiff in the "20/20" programs in insurance fraud is particularly in question because defendant had been notified prior to the date of telecast that plaintiff would not be prosecuted for anything he said or did in the course of the taped sales presentation. Consequently, summary judgment will be denied and the remaining factual issues will be left for the jury.

*Lauderback v. ABC,* (N.D. Iowa August 1, 1983). (Ap. A-1) The United States Court of Appeals for the Eighth Circuit reversed, holding that the statements were privileged opinions and remanded with directions to grant ABC's motion for summary judgment. *Lauderback v. American Broadcasting Co.* (Ap. A-6) The decision by the Eighth Circuit is reversible error in that material issues of fact remain for the jury to determine.

**A. Summary Judgment Is Inappropriate In This Action Because Of The Fact That It Was A Libel Action.**

The Eighth Circuit's decision is based in part on its view that summary judgment in libel cases is "particularly appropriate." (Ap. A-15, 16) *See also Treutler v. Meredith Corp.,* 455

F.2d 255, 257 n.1 (8th Cir. 1972); *McCarney v. Des Moines Register and Tribune Co.*, 239 N.W.2d 152 (Iowa 1976). This view, however, has recently been questioned by the Supreme Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). Justice Burger set forth his concern about the prevalence of summary judgment in libel cases and the district court's belief that "summary judgment might well be the rule rather than the exception:"

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question,...and does not readily lend itself to summary disposition.

*Id.* at 120 n.9 (citations omitted). Justice Burger not only questioned the legitimacy of the rule, he strongly suggested that summary judgment is inappropriate in libel cases. The issue raised by Justice Burger was addressed directly in March 1980 by the Court of Appeals for the Second Circuit in *Yiamouyiannis v. Consumer's Union*, 619 F.2d 932, *cert. denied*, 449 U.S. 839 (1980):

> Appellant's principle claim on appeal is that the district court erred in granting summary judgment because it thought, erroneously, that in libel cases summary judgment "may well be the rule" rather than the "exception" ....Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: *neither grant nor denial of a motion for summary judgment is to be preferred*....Defamation actions are, for procedural purposes, such as discovery...or for summary judgment, to be treated no differently from other actions; any *"chilling effect" caused by the defense of a lawsuit itself....is simply to be disregarded, to have no force and effect.*

*Id.* at 940 (emphasis added).

In response to this concern, a number of courts have adopted this "neutral approach," considering motions for summary judgment as if they were any other motion for summary judgment. *Clark v. American Broadcasting Co.*, 684 F.2d 1208, 1212 (6th Cir. 1982), *cert. denied,* 103 S.Ct. 1433 (1983); *Yiamouyiannis v. Consumer's Union,* 619 F.2d 932, 940 (2d Cir.), *cert. denied,* 449 U.S. 839 (1980); *Pep v. Newsweek, INc.*, 553 F.Supp. 1000, 1001 (S.D.N.Y. 1983; *McManus v. Doubleday & Co.*, 513 F.Supp. 1383, 1388 (S.D.N.Y. 1981); *Nader v. de Toledano,* 408 A.2d 31, 44-50 (D.C. 1979), *cert. denied,* 444 U.S. 1078 (1980).

Indeed, the Iowa Supreme Court has held that "(p)arties to a lawsuit have a right to have their legal theories submitted to the jury as long as they are supported by the pleadings and substantial evidence." *Anderson v. Low Rent Housing Com'n,* 304 N.W.2d 239, 249 (Iowa 1981). Therefore, the standard that the Eighth Circuit should have used to review the defendant's motion for summary judgment is not a preferential first amendment based standard, but a neutral approach identical to that used to review any other motion for summary judgment.

### B. The Fact That ABC Had Been Notified Prior To The Telecast That The County Attorney Did Not Intend To Prosecute Is Enough Proof Of Possible Malice To Defeat A Motion For Summary Judgment.

In *Gleichenhause v. Carlyle,* 597 P.2d 611 (Kan. 1979), the court reversed summary judgment because the defendant had been advised of the true facts before he published. The court stated:

> A court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties.

*Id.* at 613. In *Mount v. Sadik,* slip op. (S.D.N.Y. April 10, 1980), the plaintiff submitted material to defendants contradicting the charges which defendants later reported. The plaintiff contended that such material must have either convinced the defendants that the allegations were false or at the very least, created serious doubts as to the trust of the charges. The court denied defendants' motion for summary judgment. *Id.* In *Rinaldi v. Viking Penguin,* 425 N.Y.S.2d 101 (1980), the plaintiff had informed the publisher of an error in the first edition before the publication of a second edition. The second edition was then published without making the correction which publisher had promised. As a result, the court reversed the lower court's summary judgment for publisher. *Id.*

In the instant action, County Attorney Martens had notified ABC that he had no intention to pursue a criminal prosecution. (Ap. A-15) In spite of the fact that it had been informed prior to the broadcast of the truth, ABC stated in its broadcast that "Mr. Lauderback is currently under a formal investigation." (Ap. A-34) Therefore, the Eighth Circuit's decision granting summary judgment for ABC should be reversed because a reasonable jury could find malice with convincing clarity in ABC's refusal to heed the prior notice of the truth that Lauderback would not be prosecuted out of the sting interview and was merely subject to an investigation for an unrelated good faith mistake.

### C. The Eighth Circuit Erred While It Was Considering A Motion For Summary Judgment By Improperly Taking It Upon Itself To Resolve The Truth And Implications Of ABC's Statement That The Plaintiff Was Under A Formal Investigation.

Judge McManus found that the truth of ABC's statement that the plaintiff was under a formal investigation was a question of fact to be determined by the jury.

However, the Eighth Circuit stated that:

> Although uncontradicted statements by Martens indicated that he had decided by May 14, 1981, not to prosecute Lauderback for his dealings with the Mathesons, there remained a question as to whether Martens would pursue the criminal prosecution of Lauderback for his dealings with another client. Thus, ABC had grounds to believe that Lauderback might be prosecuted....We think that a viewer would reasonably conclude that had Lauderback actually been indicted by the date of the broadcast such information would have appeared in the program.

(Ap. A-15) The Eighth Circuit, in its examination of the undisclosed facts on which ABC based its libelous statements, therefore found as substantially true the statement that Lauderback was under a formal investigation and the inference that ABC would have included information about Lauderback's indictment if it had been true.

The finding that a material issue of fact is substantially true requires a determination to be made by the finder of fact. Restatement (Second) of Torts §617 comment a (1977). *See e.g., Fitzgerald v. Penthouse, Int'l, Ltd.,* 639 F.2d 1076, 1078-79 (4th Cir. 1981) (allegation that plaintiff attempted to sell top secret military information to other countries was a material fact to be determined by the jury); *Lal v. CBS,* 551 F.Supp. 356, 360 (E.D. Pa. 1982) (issue of fact whether plaintiff's building actually had "leaky roofs, faulty wiring and other eyesores").

The Eighth Circuit's finding as substantially true as a matter of law that ABC had grounds to believe that Martens would pursue the criminal prosecution of Lauderback is the very kind of material issue of fact that should have been left for jury determination. Moreover, the Eighth Circuit's inference that a reasonable "viewer could conclude that had Lauderback actually been indicted by the date of the broadcast such information

would have appeared in the program" is also a material issue that should have been resolved by the jury.

Therefore, it was error for the Eighth Circuit to find that the disputed facts were true while it was considering ABC's motion for summary judgment.

**III. The Eighth Circuit Erred In Holding That The Inferences Or "Sting" Of The Telecast As It Related To Lauderback Was A Protected Expression Of Opinion.**

**A. The Eighth Circuit Erred In Totally Excluding The Fact Finder From The Determination Of Fact Or Opinion.**

The court of appeals in *Lauderback* states, "It is for the court to decide whether a statement is fact or opinion." Such a statement may, however, be an incomplete statement of the law on this issue. (Ap. A-11, n.6)

Reasons for bringing the statement into question are these: the U.S. Supreme Court opinion cited can not be read to support such a broad rule. Although it is abundantly clear that the court is to determine as an issue of law whether a particular statement constitutes fact or opinion, Restatement (Second) of Torts §566, comment (c) (1977), there are questions to be raised regarding how the court is to make such a determination, and what role the jury might play.

The determination of whether a statement is one of fact or opinion is similar to the question of law of whether a statement is defamatory. Similarly, the determination of whether a statement is defamatory is a question of law for the court. Where, however, the statement could have been understood by the average reader to be either defamatory or non-defamatory, the issue must be left to the jury's determination. See W. Prosser, Torts 747-748 (4th ed. 1971).

The same sort of analysis has been adopted for the fact/opinion question in a clear line of state court opinions. These courts have held that "the distinction between fact and opinion is a question of law...if the statements unambiguously constitutes either fact or opinion. Where,...however, the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination." *Good Gov't Group of Seal Beach, Inc. v. Superior Court,* 586 P.2d 572, 576 (Cal. 1979), *cert. denied,* 441 U.S. 961 (1979); *Pease v. Telegraph Pub. Co.,* 426 A.2d 463, 465 (N.H. 1982); *Caron v. Bangor Pub. Co.,* 470 A.2d 782, 784 (Me. 1984); *Lyons v. New Mass Media, Inc.,* 453 N.E.2d 451, 457 (Mass. 1983); *Myers v. Boston Magazine Co., INc.,* 403 N.E.2d 376, 378-79 (Mass. 1980); *Renwick v. News and Observer Pub. Co.,* 304 S.E.2d 593, 611-12 (N.C. App. 1983); *Nevada Ind. Broadcasting Corp. v. Allen,* 664 P.2d 337-342 (Nev. 1983); *Marchiondo v. New Mexico State Tribune Co.,* 648 P.2d 321, 331 (N.M. App. 1982).

Applying this rule to the present case, on ABC's motion for summary judgment, the test would be whether the challenged language can reasonably be read as stating a fact. It seems rather obvious that the Eighth Circuit made no such analysis of the statements in the present case. Such finding should be aided by the Eighth Circuit's apparent admission that the program included a "misleading juxtaposition" of the indicted agents, the bald statement of the court that Lauderback was portrayed as a "less than honest or scrupulous insurance agent" and that Lauderback was "currently under a formal investigation." See *Lauderback v. American Broadcasting Companies,* (Ap. A-11).

This case provides an opportunity for the U.S. Supreme Court to clarify the standard in the fact/opinion question.

Although the Eighth Circuit determined the statement to be opinion, the court did so by determining "that a reasonable

viewer of the 20/20 broadcast would have recognized that inferences raised about Lauderback's honesty or about the truthfulness of his statements were opinions and not legal conclusions." See *Lauderback* (Ap. A-14).

Since the facts were "legal conclusions" the trier of fact and not the appellate court should make the determination as to how a reasonable viewer understood the inference of "sting" of the telecast.

### B. The Appropriate Standard For Review Of The Telecast Is The Information Control Test.

The test which is currently most often applied is the Information Control test. This test calls on the judge/jury to "examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all the circumstances surrounding the statement, including the medium, by which the statement is disseminated and the audience to which it is published." *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

This telecast portrayed legal settings, legal proceedings, judges, grand jury, etc.

The total impression is one of legal proceedings and not opinion of ABC.

### C. Accusations Of Criminal Conduct, Even If Phrased As Opinion, Are Not Absolutely Protected By The First Amendment.

Even if ABC's statements were properly categorized as opinion, the accusations of criminal conduct portrayed by the telecast is not absolutely protected by the First Amendment.

*Cianci v. New Time Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980); *Rinaldi v. Holt Rinehart and Winston, Inc.*, 42 N.Y.2d 369, 381-82, *cert. denied*, 434 U.S. 969 (1977).

In *Rinaldi, supra,* the court made a thoughtful analysis of how to differentiate between protected and unprotected opinion. Here the court found itself faced with defamatory statements regarding a sitting judge. The court found that "(t)he expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office, is safeguarded." *Rinaldi* at 950, citing *Letter Carriers v. Austin*, 418 U.S. 264, 283-84. "Plaintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Rinaldi* at 950 citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). For the defendant to state that a Judge is incompetent and unfit for office is to express an opinion regarding the Judge. Both opinions, even if falsely and insincerely held, are constitutionally protected if the facts supporting the opinions are set forth. *Rinaldi* at 951. Defendant's assertions, however, that plaintiff is "probably corrupt" and that his sentences of certain defendants were suspiciously lenient, with their strong undertones of conspiracy and illegality, rest on a different footing than his opinions as to plaintiff's judicial performance. These words were not used merely in a "loose, figurative sense" to demonstrate defendant's strong disagreement with some of plaintiff's dispositions. (See *Letter Carrier's v. Austin*, 418 U.S. 264, 284). The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff has committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. *Rinaldi* at 951.

If *Rinaldi* stands for anything, it must be that there need be no "bald accusation of criminal activity" by the defendant.

There can be no doubt that ABC's statements reached at least the level that Lauderback was "probably corrupt" and included "strong undertones of . .. . illegality." There seems to be no need for a rule requiring any "bald accusation" when the entire concern of defamation law is based upon the conclusions which the reasonable viewer would draw from the statements.

The statements regarding Lauderback are clearly differentiated from the statements in *Letter Carrier's v. Austin,* 418 U.S. 264, 284, and *Greenbelt Cooperative Pub. Ass'n. v. Bresler,* 398 U.S. 6. In *Greenbelt* a newspaper was sued for republishing a speaker's comment at a city council meeting that plaintiff was "blackmailing" the city in connection with pending negotiations. Justice Stewart wrote for the court that no one who read the account would have construed that the plaintiff was being charged with the crime of blackmail. The word was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S. at 14. The clear implication is that if an accusation of actual criminal wrongdoing had been conveyed, e.g., a statement that Bresler had threatened a councilman with exposure of an extramarital episode unless he voted Bressler's way, it would have been held actionable, unless within the privilege of fair reportage of public proceedings.

In *Letter Carrier's v. Austin, supra,* the court relied on *Greenbelt* in holding that no one could reasonably understand publication of a well-known definition of a "scab" attributed to Jack London, as a "traitor to his God, his country, his family and his class," as charging the crime of treason. The words were protected because defendants were using them "in a loose, figurative sense. . . merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members to those who refuse to join." 418 U.S. at 284-86.

Statements depicting an insurance agent under an affirmative, statutory duty not to misrepresent his product to the

public, in terms such as "crook," "liar," "white-collar crime," "insurance fraud," "misconduct," "unethical," "renegade agents," "dregs of the insurance industry," "illegal conduct" and "stealing" cannot be seen as "broad, unfocused, wholly subjective conduct." These are allegations of specific criminal and unethical conduct. No viewer would conclude that these terms were being used "loosely" or "figuratively." Rather, these terms were used to describe Lauderback in regard to what ABC portrayed as a "sting" of illegal and unethical misrepresentations in the sale of insurance. Under any reasonable interpretation of the law, these statements, even if clothed as opinion, are actionable.

## CONCLUSION

ABC portrayed Garo Lauderback as a criminal to a national television audience. The district court decided issues of truth and accuracy existed to be tried.

The Eighth Circuit determined the telecast was opinion, not fact, and that the undisclosed facts would not alter the average listener's interpretation.

The factual questions should be tried at the trial level with a full evidentiary hearing, not disposed of by summary judgment.

The Court is requested to reverse the Eighth Circuit under Rule 23.1 and remand the matter to the district court for trial, or to grant the Petition and allow briefs and argument.

Respectfully submitted,

Stephen F. Avery
CORNWALL, AVERY,
BJORNSTAD & SCOTT
407 Grand Avenue
Spencer, IA 51301
(712) 262-1630

Attorney for Plaintiff

# APPENDIX

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 1C 81-3031

GARO LAUDERBACK,
Plaintiff,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant.

### ORDER

This matter is before the court on defendant's resisted motion for summary judgment, filed January 12, 1983.

Denied.

Plaintiff initiated this action for compensatory and punitive damages alleging that defendant defamed him during the May 14 and 21, 1981 broadcasts of its television show "20/20." Defendant now asks the court to grant summary judgment against plaintiff for two reasons. Defendant contends that the broadcasts of which plaintiff complains are nonactionable because they are 1) true as to all statements of fact contained therein and protected comment as to all other statements and 2) privileged as a report of an official government investigation. Plaintiff resists defendant's motion and denies that the broadcasts were true or constituted a "report of an official government investigation."

Briefly, the undisputed facts are as follows: In late 1980, the Emmet County Attorney's office initiated an "undercover" insurance investigation of Northwest Iowa insurance agents as related to elderly citizens' complaints of insurance sales fraud. The Emmet County Attorney enlisted the aid of defendant to

videotape suspected agents making sales presentations to elderly citizens who were assisting in the investigation. In return, defendant was granted the right to use the videotapes on its "20/20" program or however it desired. Plaintiff was videotaped while making a sales presentation and portions of that videotape were later used in two of defendant's "20/20" programs.

Summary judgment should not be entered unless the record indicates that there is no "...genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..." FRCP 56(c). It is a procedure which advances the salutary objective of avoiding useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried. *Anderson v. Viking Pump,* 545 F.2d 1127, 1129 (8th Cir. 1979); *Lyons v. Board of Education of Charleston,* 523 F.2d 346, 347 (8th Cir. 1975); see also *Bouilles v. Ricketts,* 518 F.Supp. 687, 690 (D.C. Col. 1981).

Here, there are genuine issues to be resolved regarding damages, the factual accuracy and truth of the portion of the "20/20" reports concerning plaintiff, and defendant's motivation in telecasting those programs. Hence, summary judgment is not proper, unless defendant's claim of privilege is found to be justified.

Questions concerning damages, the truth of statements, and whether or not a libelous meaning was intended or conveyed by the alleged defamatory statements are for the jury to decide. See *Brown v. First Nat. Bank of Mason City,* 193 N.W.2d 547 (Iowa 1972). It is for the court to decide as a matter of law whether a privilege is available for the libelous communication in question. *Id.*

Defendant claims that the statements made regarding plaintiff on the "20/20" programs are privileged as a report of official government records and actions. The court cannot agree.

The privilege claimed by defendant is set out in Restatement (Second) of Torts § 611.

§ 611. Report of Official Proceeding or Public Meeting

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

It is apparent from reading § 611 and the comment and annotations applicable thereto that the privilege extends only to official actions which have been made a matter of public record. However, the investigation which took place here was a secret investigation primarily carried out by private parties. No charges or prosecution resulted from the investigation and it does not appear that there was an official report or record made of the investigation.

To allow defendant to claim the privilege in this case would open the door for widespread abuse of that privilege. In effect, it would mean that, as long as a news organized agreed to release its findings to a public prosecutor, it would be free to conduct its own investigations and disseminate the findings, without regard for the potential defamatory effect of those findings. This court will not expand the privilege to such a degree.

Defendant's motivation for including plaintiff in the "20/20" programs on insurance fraud is particularly in question because defendant had been notified prior to the date of telecast that plaintiff would not be prosecuted for anything he said or did in the course of the taped sales presentation. Consequently, summary judgment will be denied and the remaining factual issues will be left for the jury.

It is therefore

ORDERED

Denied.

August 1, 1983.

/s/ Edward J. McManus
Chief Judge
United States District Court

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 1C 81-3031

GARO LAUDERBACK,
Plaintiff,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant.

### ORDER

This matter is before the court on defendant's resisted motion to certify interlocutory appeal, filed August 22, 1983.

Granted.

On August 1, 1983 the court denied defendant's motion for summary judgment for the reason that material factual issues remained and because the record then before the court did not support defendant's assertion, that the allegedly libelous telecasts were privileged communications. Defendant now asks the court to modify its August 1, 1983 order in accordance with 28 U.S.C. §1292(b) for the purpose of effecting defendant's right to an interlocutory appeal of the order. Plaintiff resists defendant's motion arguing that an interlocutory appeal would merely protract and delay plaintiff's opportunity to be heard on the merits.

Permission to allow interlocutory appeals should be granted sparingly and with discrimination. *Control Data Corporation v. International Business Machines,* 421 F.2d 323, 325 (8th Cir. 1970). However, the court agrees that, in this case, the question of whether defendant's statements are privileged as a matter of

law is a controlling one and resolution of that issue prior to trial would materially advance the ultimate termination of the lawsuit. *Id. See also Time, Inc. v. McLaney,* 406 F.2d 565, 566 (5th Cir. 1969), cert. denied, 395 U.S. 922 (1969).

It is therefore

ORDERED

The court's August 1, 1983 order is hereby modified to state, at the end thereof, "This order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of the litigation."

The Final Pre-Trial Conference scheduled for Friday, September 16, 1983 is continued pending appeal of this matter.

September 13, 1983.

/s/ Edward J. McManus
Chief Judge
United States District Court

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2381

Garo Lauderback,
Appellee,

v.

American Broadcasting
Companies, Inc.,
Appellant.

---

Appeal from the United States
District Court for the Northern
District of Iowa.

---

Submitted: February 17, 1984

Filed: August 21, 1984

Before LAY, Chief Judge, HEANEY and BOWMAN,

Circuit Judges.

LAY, Chief Judge.

The American Broadcasting Companies, Inc. (ABC), appeals from the denial of its summary judgment motion in a libel action brought by Garo Lauderback. The district court[1] found that material factual issues remained to be resolved and that the record did not support ABC's assertion that the allegedly libelous telecasts were privileged communications. The court certified its order to this court under 28 U.S.C. §1292(b).

---

[1] The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, presiding.

Because we conclude that any inferences relating to Lauderback were protected expressions of to opinion, we reverse and remand to the district court with directions to grant ABC's motion for summary judgment.

**FACTS**

In 1980, after receiving complaints from senior citizens in Emmet County, Iowa, John Martens, the county attorney, decided to conduct an investigation into fraud in the sale of medical and hospital policies of insurance to senior citizens. Martens wanted to videotape the sales presentations of some insurance agents, allegedly for preservation of evidence to be used in any subsequent proceedings. Martens solicited the aid of ABC and CBS. Charles Thompson, one of the producers of ABC's 20/20 program, eventually agreed to help. Martens also solicited the assistance of a Des Moines television station, WHO-TV, and of Iowa Insurance Commissioner Bruce Foudree who at that time was working on a similar undercover insurance investigation.

Martens and his staff recruited senior citizens to act as "decoys" and to request information from insurance agencies. Martens chose the agencies to be contacted[2] and sent letters out in the names of his recruits. One of these letters was sent to Michael Crawford, a general agent who at that time employed Garo Lauderback.[3]

---

[2] Martens chose to contact agents who had had complaints made about them to the Iowa Insurance Department.

[3] On Sept. 30, 1980, the Iowa Insurance Department filed a charge against Crawford on the basis of a complaint about life insurance sold to an elderly woman. According to Crawford's deposition, the charge was later dropped.

Crawford sent Lauderback to discuss insurance with Carl and Dagney Matheson, two of Marten's recruits. Martens had arranged for this meeting to be videotaped by ABC's crew. During the course of the presentation, Lauderback made several statements about his insurance policies, some of which were made without knowledge of the subject matter and some of which were admittedly false. Several weeks before the date on which ABC was to air the videotape on its 20/20 program, Thompson contacted Lauderback to get a statement. This was the first time Lauderback was informed about the videotaping. Thompson later received a phone call from Mrs. Lauderback commenting on her husband's actions subsequent to the videotaping. No further calls were exchanged between Thompson and the Lauderbacks.

ABC aired a portion of the videotape of Lauderback on its May 14, 1981, broadcast of the show 20/20. On June 19, 1981, Lauderback filed suit against ABC alleging that the May 14 broadcast of the show and the next week's show (which also had a report on insurance fraud but did not mention or show Lauderback) libeled him.[4]

During discovery, 12 depositions were taken. On January 12, 1983, ABC filed its motion for summary judgment basing its request on two theories: (1) all the statements of fact made about Lauderback were true and other statements were protected as opinion, and (2) the broadcast was privileged as a report of an official government investigation. The district court denied ABC's motion. The court found that genuine issues of material fact needed to be resolved and that the official report privilege extended only to official actions that have been made a matter

---

[4] In his brief, Lauderback does not discuss the broadcast of May 21. We conclude that he is not relying on representations made in that broadcast and, thus, we confine our discussion to the May 14 broadcast.

of public record. Upon application, the matter was then certified for an interlocutory appeal under § 1292 (b) and this court granted the motion.[1]

The relevant portion of the broadcast began with a picture of a newspaper headline which read "Emmet Grand Jury Indicts Two Iowa Insurance Agents." While the headline was on the screen, a voice-over stated: "The fact that most policies do not cover extended nursing home care has received some publicity." The next picture shown was that of Lauderback during which showing the announcer stated: "So the agents just say, 'Oh, it's the other guys who are doing the stealing.' " Following this statement, a portion of the tape made of Lauderback at the Matheson's house was shown. On this tape, Lauderback states that a director of a local nursing home had on another occasion verified that Lauderback's insurance policy would pay for care at the facility. The next segment shows a brief interview with the nursing home director during which he denies ever having spoken to Lauderback. The final reference to Lauderback is a statement by the announcer toward the end of the segment that "Mr. Lauderback is currently under a formal investigation."

The broadcast at several points shows criminal proceedings against other Iowa Insurance agents. During the broadcast epithets such as "rotten," "unethical," and "sometimes illegal" are used to describe the practices of agents who sell worthless policies to senior citizens. The agents themselves are referred to as "crooks" and "liars."

On appeal, Lauderback contends that the 20/20 broadcast, on the whole, characterized him as a crook and a liar. Lauderback argues that these characterizations, although untrue, were

---

[1] Although the trial court granted certification specifically on the issue of fair report privilege, on appeal, all issues are before this court. *The Board of Managers of the Arkansas Training School for Boys v. George,* 377 F.2d 228, 231 (8th Cir. 1967).

presented as facts or, alternatively, that they were represented as opinions which appeared to be based on undisclosed facts. Because we conclude that statements made by ABC which related to Lauderback are protected opinion, we reverse the district court's denial of ABC's motion for summary judgment.

**Discussion**

The traditionally state-regulated area of defamation has in the past 20 years become increasingly dominated by the federal Constitution. With *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court has declared that First Amendment safeguards are available to media defendants in defamation actions. It is true that not all statements by the media are insulated from attack as defamatory, *see, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976); however, the publication of truthful, non-private facts and of pure opinion is protected by the First Amendment. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-90 (1974);

A difficult question is presented when one statement may be interpreted as either fact or opinion. While the right of free speech provides absolute protection to statements which are purely opinions, *Gertz v. Welch* at 339-40, it is conceded that statements clothed as opinion which imply that they are based on undisclosed, defamatory facts are not protected. This stricture on publication of opinion rests on the assumption that, given all the facts of a situation, the public can independently evaluate the merits of even the most outrageous opinion and discredit those that are unfounded. On the other hand, when an opinion held out for belief is stated so that the average listener would infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual. Thus, the

Constitution contains safeguards which protect both the right to publish opinions and the right of a private individual to be protected from unfounded statements clothed as fact.

Lauderback first contends that ABC's broadcast stated as a fact that he was a criminal or had been indicted on criminal charges. Lauderback apparently asserts that the successive showing of the newspaper headline regarding the indictment of two Iowa insurance agents and then the picture of Lauderback gave rise to the inference that Lauderback himself was one of the indicted agents. However, this purportedly misleading juxtaposition was quickly clarified when the two agents who actually were indicted were named and discussed. Also, at the end of the broadcast, the program's announcer stated that Lauderback was "currently under a formal investigation." We find that the average viewer would conclude from this that Lauderback had not yet been indicted or convicted of a crime.

Lauderback next argues that the "gist" or "sting" of the broadcast was that he was a crook or liar. We agree that, given the broadcast as a whole, Lauderback was portrayed as a less than honest or scrupulous insurance agent. However, we conclude that this portrayal indicated ABC's opinion of Lauderback's dealings and not a bald accusation of criminal activity.[6]

In *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983), the Ninth Circuit was presented with a similar situation. Lewis was a practicing attorney who found himself the subject of a segment of a Time Magazine article. The article,, entitled "Those **§!!! Lawyers," stated in relevant part:

> If the legal profession has been reluctant to discipline its shadier practitioners, it has been swift to crack down on anyone threatening to cut fees or reduce business.

---

[6] It is for the court to decide whether a statement is fact or opinion. *See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974).

* * *

> Under these circumstances, it is hardly surprising that some Americans have grown cynical about lawyers — and the law. What is more, every day's newspaper offers up fresh horror stories. . . . Thanks to painfully slow bar discipline, a northern California lawyer named Jerome Lewis is still practicing law despite a $100,000 malpractice judgment against him in 1970 and a $60,000 judgment including punitive damages in 1974 for defrauding clients of money. . . .

*Lewis v. Time* at 550-51. Lewis sued Time alleging that the readers of the article would draw negative inferences about him, that is, they would infer that he was going to be disbarred. He claimed, as does Lauderback in the instant case, that the statements about him were understood alternatively as fact or as opinion which appeared to be based on undisclosed fact.

The Ninth Circuit rejected Lewis's argument that the article indicated that disbarment was a foregone conclusion. However, the court concluded that even if the article did imply this, the implication was no more than an "outsider's prediction of the uncertain outcome of a future adjudication," *Id.* at 552, and was protected opinion: "The inference that Lewis's morality or legal abilities were doubtful, or that he was unreliable and disreputable, is a broad, unfocused, wholly subjective comment, not the kind of factual expresseion for which the Constitution permits liability to be imposed." *Id.* at 554. Time's full disclosure of the true facts supporting its accusation brought the statements within the safeguards of the First Amendment.

Lauderback seeks support from *Cianci v. New Times Publishing Company,* 639 F.2d 54 (2nd Cir. 1980). In *Cianci,* the defendant magazine printed an article about Cianci, who was seeking reelection as Mayor of Providence, Rhode Island. The article stated that Cianci had been accused of rape 12 years

earlier and included an interview with the alleged victim, recounting her attack. The article contained the statement that the State Crime Law expert who had conducted the lie detector tests believed that the report on the tests showed "one of the most clear cut cases of rape he had ever processed." *Id.* at 57. The article continued with an explanation that the charge had been dropped and that the district attorney had decided not to prosecute due to lack of evidence which, according to the article, stemmed from a settlement between the alleged victim and Cianci. The article concluded with the statement that "(f)or the nominal sum of $3,000, Cianci had managed to buy his way out of a possible felony charge." *Id.* at 58.

The Second Circuit found that a jury "could surely conclude that New Times was saying that Mayor Cianci, instead of being the man of character he represented himself to be, was in fact a rapist and an obstructor of justice — not simply a person who had been accused of being such." *Id.* at 60. The court found that the article represented as fact the rape and Cianci's settlement with the complainant. The article also contained quotes from others who represented as fact Cianci's involvement in the rape. The court further found that a reasonable reader of the article would infer that Cianci had paid a $3,000 settlement to the complainant *before* the criminal charges against him had been dropped. The truth was that the criminal charges first were dropped due to lack of evidence and then Cianci made an offer of settlement to the complainant evidently to preempt a civil suit by her.

The court of appeals rejected the argument that these statements were protected as pure opinion. Such privilege, the court reasoned, does not exist for "a charge which could reasonably be understood as imputing specific criminal or other wrongful acts." *Id.* at 64. The fair comment privilege also did not apply, the court reasoned, because "charges of specific criminal misconduct" are not "comment." Also, the court found that the facts of the article and any opinions stated

therein were inextricably intertwined and in such a case, "it is meaningless to say that the opinion is protected, when the facts are not." *Id.* at 67.

While allegations of specific criminal conduct generally cannot be protected as opinion, broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion. *See, e.g., Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264 (1974) (use of the term "traitor" understood to imply no specific criminal conduct); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler,* 398 U.S. 6 (1970) (same for the term "blackmail"). In the instant case, we find that the impression left by the broadcast, that Lauderback was dealing unscrupulously with senior citizens, is more analogous to a "broad, unfocused, wholly subjective comment" than it is to specific accusations of feloneous conduct.[7] We conclude that a reasonable viewer of the 20/20 broadcast would have recognized that inferences raised about Lauderback's honesty or about the truthfulness of his statements were opinions and not legal conclusions. While the television medium particularly must be aware that grouping actual criminals with innocent persons may convey an inference of guilt for all, we do not feel media reporting can be unduly restrained in showing the facts and disclosures of an ongoing or completed investigation. We conclude that the broadcast as a whole may have indicated that ABC believed Lauderback to be guilty of unethical behavior. However, any representation of such was understandable as opinion and not fact.

---

[7] There is no dispute that the tape was a valid representation of Lauderback's meeting with the Matheson[s] and that Lauderback did not speak to the nursing home director. It is uncontested that prosecutor Martens was considering bringing charges against Lauderback for a sale which was referred to on the video tape. Martens also stated in his affidavit that an administrative investigation was being conducted at the time of the broadcast by the Insurance Commissioner's office.

Our analysis of Lauderback's claim of defamation does not end by finding that the relevant statements were opinion. As we earlier have noted, opinion which purports to be based on undisclosed facts is not protected speech. Lauderback argues that ABC had knowledge before the date of the broadcast that no criminal charges would be brought against him. He argues that the writers had a duty to disclose this fact in order that the negative statements regarding lauderback could be evaluated accurately by the viewing public.

Although uncontradicted statements by Martens indicated that he had decided by May 14, 1981 not to prosecute Lauderback for his dealings with the Mathesons, there remained a question as to whether Martens would pursue the criminal prosecution of Lauderback for his dealings with another client. Thus, ABC had grounds to believe that Lauderback might be prosecuted for some actions relating to insurance sales to senior citizens. We also point out that not all information favorable to the plaintiff need be disclosed as the basis of a published opinion. *Cf. Brown v. Herald Co., Inc.*, 698 F.2d 949 (8th Cir. 1983). We think that a viewer would reasonably conclude that had Lauderback actually been indicted by the date of the broadcast such information would have appeared in the program. By its very nature, a media investigation of an industry conveys the message that all negative facts relevant to the topic will be revealed. In the instant case, the factual bases for the inferences raised about Lauderback were revealed. The videotape of Lauderback, the interview of the nursing home director, and the statement by the Insurance Commissioner regarding the sale of insurance to the elderly, in general, formed the bases of the opinions in the broadcast. No undisclosed facts existed which were necessary for the viewers to be able to independently evaluate the opinions expressed.

We acknowledge that summary judgment is an extraordinary means of disposing of an action and, thus, should be used only when no factual disputes cloud the legal issue presented. This

court has held that summary judgment may be "particularly appropriate" in an action for defamation. *Truetlen v. Meredith Corp.*, 455 F.2d 255, 257 n.1 (8th Cir. 1972). Where the court determines that the allegedly defamatory statements are opinion and that the plaintiff can point to no undisclosed facts which would substantially alter the average listener's interpretation of the opinion, summary judgment for the defendant is warranted.

We therefore reverse the district court's denial of ABC's motion for summary judgment and remand the case to the district court for proceedings in accordance with this opinion.

Each party to pay its own costs.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX D

**ABC NEWS**

7 West 66th Street, New York, N.Y. 10023
**Transcripts:** Box 2020, Ansonia Station, New York, N.Y. 10023
**Press contact:** Veronica Pollard (212) 887-4099

# 20/20

## May 14, 1981

AV WESTIN Vice President & Executive Producer
HUGH DOWNS Host

**"The Pope Who Touches the People"**

Jan Rifkinson Producer
SYLVIA CHASE Correspondent

Additional footage provided by Edward J. Piszek,
Catholic Relief Service, Food for Poland
Windover Productions/Albert C. Waller

**"Twist & Stack"**

CHARLES C. THOMPSON, II Producer
GERALDO RIVERA Correspondent

Additional videotape courtesy of KETV, Omaha, Nebraska
WHO-TV, Des Moines, Iowa, KCAU-TV, Sioux City, Iowa

**"Paul Anka"**

PAMELA H. COHEN Producer
BILL REDEKER Correspondent

Additional footage courtesy of Johnny Carson Productions

ALL RIGHTS RESERVED. Copyright © 1981 by American Broadcasting Companies, Inc. This transcript may not be reproduced in whole or in part by mimeograph or by any other means, without permission.

**TRANSCRIPT CHARGES:**
One to ten copies, $2.00 each; additional copies, $1.00 each. Be sure to indicate air date and subject or participants. Send order with payment to Box 2020, Ansonia Station, New York, N.Y. 10023. Annual subscriptions available at $95 per year. Indicate starting date and enclose payment. All order must be prepaid. Make check payable to 20/20.

ABC NEWS 20/20

**MAY 14, 1981**

**HUGH DOWNS:** Good Evening, I'm Hugh Downs. And this is 20/20.

**ANNOUNCER:** On the ABC news magazine, 20/20, tonight.

**MUSTAFA GURSEL, Turkish Journalist:** The question is, is it possible for this man to have travelled from Germany, Switzerland, Spain, France and Italy, alone, under false passports and false identities?

**ANNOUNCER:** Yesterday in Rome this man in the crowd, a known terrorist. The Italian police had been warned. What kind of man would be an assassin? How does a dangerous terrorist move freely through Europe? Is there a network of murder in the world? Hugh Downs asks the experts the questions that must be asked about the plan to kill the Pope.

**EDWARD J. PISZEK:** He's imaginative; he's compassionate; he has charisma. When you add all those things together, you have quite a man.

**ANNOUNCER:** Pope John Paul II. All of his life, this pope—as a priest, a bishop, a cardinal—has exchanged love with the people. All of his life, this pope has moved in the open, has moved toward his critical encounter yesterday in Rome. Sylvia Chase with a report on the qualities that have made John Paul II the pope who touches the people.

**JACK KIBBIE:** A few white-collar crooks come in the front door and in a matter of two or three years, take your entire life savings.

**ANNOUNCER:** Old people. Easy victims of flim-flam men selling insurance policies that are unnecessary and, to some, worthless. Tonight, the salesmen reveal themselves before hidden cameras in an investigative report. Geraldo Rivera examines unethical insurance sales tactics by agenst who twist and stack.

**FRANK SINATRA:** Paul is a very talented young man — he really is, you know. I call him a kid. And he calls me the old-timer.

**PAUL ANKA** *[singing]: You and I will be as free—*

**ANNOUNCER:** Paul Anka, a singer and a composer. He was a pop music veteran by 19 with a dozen top hits, a world tour and songs in five languages.

**ANKA** *[singing]: Diana.*

**ANNOUNCER:** Now, he's 39, a top star in Las Vegas. He's written nearly 700 songs, some for Tom Jones, Barbara Streisand, Frank Sinatra. Tonight, Bill Redeker with a show business profile of Paul Anka.

**HUGH DOWNS:** Up front tonight, the condition of Pope John Paul II—guarded and showing signs of improving. Now, many serious questions have been raised by yesterday's attempt on th pope's life. How could it happen? Why? Is there a plot? Well, tonight, we will try to bring you answers to some of these questions that we have all been asking. The first: What kind of person would feel driven to kill a pope—this pope? We asked a psychiatrist, Dr. David Hubbard. He is director of the Behavioral Research Center at the University of Texas. And he specializes in understanding the personality of terrorists.

**DR. DAVID HUBBARD, Psychiatrist:** I think you have to begin with the assumption that these are not normal people. They have been social misfits almost from the beginning of their

existence. The age at which they begin to radicalize and assume this desperate posture is usually between about 28 and 30. I think assassins, by and large, would be about that age. It's about the age that society shakes out the failures among men. And at that point, a man must either accept his own personal failure or lay it off as blame on some other individual. These men, in their loneliness, tend to idealize some group—the Fourth of July Memorial Group or the Black Communists of Mexico, or some such thing. This doesn't mean they belong. Indeed, one will find these men have generally never belonged to any political party, have never taken up funds for a political party; they have never recruited for a political party and they have never belonged to any activity cell. They are loners. They idealize this group and at a distance, they wish they could belong to it.

**DOWNS** *[voice over]:* Now, we ask about the very man who was seized right after the attack on the pope. Why was he in that crowd at all? He had warned, in a letter to a newspaper more than a year ago, that if the pope visited his country. Turkey, he would kill him. Under heavy security, the pope did visit Turkey, was told of the warming and didn't take it seriously, John Paul said, "Poor man, poor boy." The man is Mehmet Ali Agca and he is a known terrorist, a murderer. He killed a respected editor in Turkey in 1979. He escaped from prison and has been at large since. We asked a Turkish journalist, Mustafa Gursel, about him.

**MUSTAFA GURSEL, Turkish Journalist:** I would say he is a lost soul, a coldblooded murderer. He is the most wanted, the most notorious terrorist in Turkey. The organization that he belongs to is an underground organization of the extreme right-wing Nationalist Action Party, which is now on trial in Turkey. About 450 members of this party is being tried and the death penalty is being asked for 220 members of this party.

**DOWNS:** Now, what would his motivation have been in 1979 for threatening to kill the pope?

**GURSEL:** Before the papal visit, he said in this famous letter, that he saw the pope as an agent of imperialism and that he accused the pope of coming to Turkey at a time when Turkey was trying to develop closer ties with the Middle Eastern countries. And because of that, since he saw the pope as a crusader, he was going to kill him. Now, according to information given by the Turkish government, he definitely lived in Germany for quite awhile. He has also been spotted—claimed to have been spotted—in Switzerland, France, Spain, before coming to Italy a week ago. And the Turkish government—and this has been confirmed by Rome—informed the Italian government last week that he had been spotted in Milan.

**DOWNS:** In the hospital yesterday, the pope asked, "How could they do it?" They. Was there word of a plot? Did the Vatican or the Italian police know something? ABC news correspondent, Pierre Salinger reported from Rome earlier tonight that Italian police are convinced that Agca is a highly-trained terrorist. He claims friendship with George Habash, a Palestinian terrorist leader. But he won't tell police how he got the fake passport with which he entered Italy or where he got the powerful nine-millimeter pistol taken from him after the attack on the pope. How did he get all this help? Do terrorists work together extensively? Do they cooperate from one country to another? We asked Robert Kupperman, who is director of the Georgetown University Center for Strategic Studies.

**ROBERT KUPPERMAN:** Many of us have known for years that there has been a very, very tight organization among terrorists, some sponsored by patron states, others loosely supported, including potential Soviet cooperation. They know each other's telephone numbers. Not all telephones are monitored. There's often a cell structure so that if the authorities capture one element of it that the whole organization doesn't collapse. Couriers—special couriers—are used.

**DOWNS:** How—can you give an example of a network of terrorists organizations that you know to exist, now?

**KUPPERMAN:** Sure. The—for example, there are very close ties between Palestinian organizations, such as the Popular Front for the Liberation of Palestine, and, say the Red Army Faction, which is the successor to the Baader-Meinhof gang. Look at some of the operations that have occurred in the past—at Entebbe, the OPEC raid, you had both Germans and Palestinians. In the case of the Lode Airport massacre, you had there Japanese terrorists. They clearly were trained by Palestinian terrorists. There is discussion and there's no proof—there is no smoking gun, if you will—of potentially having had not only Palestinian instructors but also Soviet instructors.

**DOWNS:** The kind of police action that might have anticipated the appearance of a man who had threatened the pope in 1979, was known to be in Italy—where did the police fail in anticipating his arrival on the scene at some point to finish what he had threatened to do?

**KUPPERMAN:** You know, a lot of countries just don't want to know there are terrorists coming in and out. They don't want to know the problem of it. They don't want to bring the plague of terrorism upon them. It has almost the psychiatric problem of denial. If you don't know about it, you don't hear about it, you see nothing—it will go away.

**DOWNS:** It doesn't exist.

**KUPPERMAN:** That's correct.

**DOWNS:** A bizarre but perfectly plausible explanation from an expert about why Interpol failed to act.

**DOWNS** *[voice-over]:* And now the target—the man, the pope, whose open style, whose impulse to reach out to people keeps him in danger. Just last week, one of his aides said, "if someone wants to get to this pope, he can do it." We asked Dr. Hubbard why the pope would be a typical target.

**DR. HUBBARD:** Well, a typical target is somebody who is the ultimate daddy. And if you take the familiar term used in rela-

tionship with the pope, he is the papa. And all the words that flow from the word patriarch—patria—these things are all involved. But that only makes him the top of the heap. The men who seem to call an assassin towards themselves are the men who have the common touch. And I suppose this particular pope has touched more other hands in the last two years than probably any other human being on earth. He has been seen in person by probably more millions of people than any other man on earth. He has been among the people, in his busy travels. He has walked on many old trails, many of which, of course, are too regional to be noted. But it is out of these regional conflicts that frequently can arise this sort of individual.

**DOWNS:** Now for a look at the open nature of the pope. Here is Sylvia Chase. Sylvia?

**SYLVIA CHASE:** Hugh, it is as if everything about Pope John Paul II worked together to move him toward that critical encounter yesterday. His openness, his powerful urge to reach out to the whole world, his insistent mobility—all of the qualities he brought with him to the papacy.

**CHASE** *[voice-over]:* October, 1978. Joy rings out in Communist Poland. There is a new pope, a Pole—Karol Wojtyla. John Paul II. Right from the start of his papacy, John Paul reached out to the people as he always had. And never more dramatically than when he returned to his native Poland. Why? Because he has always believed that the church would wither and die if it is led by people who behave like they are special. So his style has always been a personal one, an intimate one. He is drawn to people and people are drawn to him. In his native Carpathia, they walked all night to be with him. They remembered their cardinal, a man they could touch, a leader who made them brave and kept their church open against the closed Communist rule of their Poland. It was more than politics with him, though. He appears to be—quite simply—a trusting and open man. A childhood neighbor remembers how it was with him growing up.

**MRS. SZCZEPANSKA, neighbor** [through translator]: As a little boy, he used to run around the yard together with his friends, always laughing and merry. And this photograph of the Cardinal Wojtyla reminds me of a little Lolusa, only some 40 years younger. The same smiling and merry eyes, the same smile—natural, hearty, kind, brotherly.

**CHASE** *[voice-over]:* After the death of his mother and his brother, Karol was raised by his father. He was a retired Army officer. Even then, a schoolmate remembers that there was always something special about him.

**ZBIGNIEW SILKOWSKI, Schoolmate:** He was head and shoulders above the rest of our class. And every one of us can confirm that his level, his methods of study, his way of thinking, his areas of interest, were a whole world deeper than that of any of us.

**CHASE:** *[voice-over]:* At the University in Cracow, the future pope discovered the stage. It became a way for him to reach out to the public. He was considered a fine actor. A play he wrote then is now being produced as a film and television special. But the creative years were cut short by the German invasion of Poland in 1939. The future pope, like many students and scholars, went to work as a laborer in a quarry and chemical plant to avoid being sent to Germany as forced labor. He still remembers his fellow workers and they still remember him.

**PLANT WORKER** *[through translator]:* He used to work various shifts like I did. We often shared our bread with each other. For those were difficult times, under the occupation.

**CHASE:** *[voice-over]:* "One doesn't forget those facts," Wojtyla said. "All that boiled up in my soul and resulted in the priestly calling." During these years, Wojtyla began studying theology. And during the last year of the war, to avoid arrest by the Gestapo, he was forced into hiding—the first and only time in his life he went underground. He lived in secret in the Bishop's Palace in Cracow. He said of those war years, "I had

the sense that this built us up rather than destroyed us." After the war, Karol Wojtyla emerged to find Poland under Communist rule nearly as grim as it was under the Nazis. He was ordained a priest; and in the face of an often repressive government he was uncompromising. A very public leader of his church, his popularity grew with the people. After all, he had shared the war years with his parishioners. Together, they had all known hunger, fear. And they knew that this man had been an ordinary laborer. When Father Wojtyla was consecrated, he took as his motto *Totus Tuus.* Translated from Latin, that means "completely yours". Father Wojtyla took the position that because most Poles are Catholics, the Communist government should serve the needs of the church. He drew upon that passionate commitment when the government built a model community from the ground up and did not build a church. Karol Wojtyla took to celebrating open-air masses on the site of his proposed church. And huge congregations they were—20,000 and more assembled to be with this man who understands that the spiritual commitment of a people can survive—even thrive—in the face of political repression.

**Voice of POPE PAUL II:** The church in Poland is living its own life. That is very important. And I suppose that that is important for the church everywhere—to living its own life.

**CHASE** *[voice-over]:* The church Wojtyla had dreamed of was built just where he wanted it, on the site where he had defiantly celebrated those open-air masses. At the dedication, he was among his people—as always, more and more of them.

**PISZEK:** His work in Poland showed how courageous he was. He is imaginative; he is compassionate, he has charisma. When you add all those things together, you have quite a man.

**CARDINAL, Conclave:** *Habemus Papam.*

**POPE JOHN PAUL II:** *Sealudatu Jesu Christu.*

**CHASE** *[voice-over]:* Pope John Paul II sees his ministry as the world. And he has conducted his papacy as if it were one con-

tinuous audience with his people, whether they come to him or he goes to them—more than half a billion Roman Catholics. This pope seems to want to see them all. Perhaps memories of his impoverished youth draw him to poor countries. This man who has been hungry and afraid himself has said, "You have a right to be respected and not to be deprived of the little that you have. You have the right to throw down the barriers of exploitation." Perhaps the finesse he acquired on the stage in college gives him the courage to present himself to millions. Is he recalling his years of struggle against a totalitarian government when he says, "The church will not hesitate to take up the cause of the poor and to become the voice of those who are not listened to when they speak up—not to demand charity but to ask for justice"? And who can forget John Paul's trip to the United States. When he spoke, he was not always friendly to the industrialized West. Recalling, perhaps, his years in the quarry, he said the gap between the church and the factory must be narrowed and the fumes of incense mixed with those of industry. Remember his exhortations in a land of plenty; help those who are most in distress, those who are extremely poor, those suffering from all the physical, mental and moral ills that afflict humanity; there are many in your own midst. And there was this, in St. Charles Cathedral in Overbrook, Pennsylvania. And this moment of pure love in Chicago, John Paul II, the pope who touches the people.

**DOWNS:** What a remarkable man. Sylvia, thank you. Next, Geraldo Rivera with a report on unscrupulous insurance salesmen cheating the elderly.

*[commercial break]*

**DOWNS:** Tuesday of this week, there was a major action in Washington that could add to the anxieties of older people in America. The White House announced details of its plan to reduce Social Security payments to the retired. Any reduction, whether in medical benefits or in income the elderly have

available for medical bills, caused deep worry among the aged and could make them more susceptible to the sales pitches of a new breed of con man. Here tonight with a shocking investigative report on a kind of fraud that thrives on the fear of the elderly is Geraldo Rivera.

**GERALDO RIVERA** *[voice-over]:* Thanks, Hugh. As most people get older, they become more and more frightened about the financial consequences of illness. They worry, for instance, about how they would pay their bills if they were to become really sick. So, many seek to insure themselves against devastating medical expenses. But some fall victim to a white-collar crime on the rise—insurance fraud, agents who go door-to-door trying to sell inflated or, at times, even worthless policies to unsuspecting and vulnerable old people.

**SALESMAN:** Cataracts, stroke, heart attack, new kneecaps for arthritis, gall bladder, strokes, aneurisms in the brain, pacemakers, any—fall and break a hip, fall and break a toe, ingrown toenail—I can go down the list. Anything. Anything. Anything.

**RIVERA** *[voice-over]:* Anything. Anything. Anything. As the hidden camera show, these flim flam men, this unethical minority of the insurance industry, will apparently say anything, anything, anything to trick the elderly into buying unnecessary and therefore worthless insurance policies. They will use heavy-handed scare tactics.

**SALESMAN:** It's important to you, now. And that's because you are at an age now where you know that the law of averages aren't with you like they used to be. Your susceptibility to sickness is extremely great.

**SALESMAN:** If you still can't manage to be on your own after 15 months, chances are you will never come out of that remission. Not a nice way to put it but—

**RIVERA** *[voice-over]:* They'll tell you little lies about their own personal experiences.

**SALESMAN:** My wife's grandma, she was in a nursing home in Holstein for nine years and she had two farms—

**SALESMAN:** My wife's grandma was in the nursing home in Holstein, Iowa for seven years and she had three farms—

**RIVERA** *[voice-over]:* And they will grossly exaggerate or outright lie about the extent of the coverage they are selling.

**SALESMAN:** After 90 days, it covers absolutely everything, 100 per cent.

**SALESMAN:** We would come in and pay 100 percent of that expense.

**RIVERA:** *[voice-over]:* Iowa State Law forbids these gentlemen from claiming that their policies cover anything and everything 100 percent. In fact, actual coverage is far less. To expose wrongdoing by insurance agents, 20/20 and several television stations recently videotaped various "sting" operations, using hidden cameras to monitor insurance sales pitches. Last December, for instance, station WHO in Des Moines, working in conjunction with the Iowa Insurance Commission secretly videotaped eleven agents selling insurance to an elderly woman who is actually an employee of the Insurance Commission.

**SALESMAN:** If anything I say in our policy is not exactly— exactly—what I have written here, you take this, you fold it up, you can send it to the Iowa Insurance Commissioner at the Lucas State Office Building. Tell him Carl Rossi from Guarantee Trust was here and he told me all these things and it's a lie. I will lose my license immediately for fraud.

**RIVERA** *[voice-over]:* Well, Mr. Rossi has been charged with fraud. And the state is attempting to revoke or suspend his license to sell insurance. One of the most common rip-offs involves an unethical sales technique called "twisting". You see, these guys earn most of their commission during the first year a policy is in effect. So it is in their best interest to keep you changing your insurance, get you to shift from one policy to

another as often as possible. They win by repeatedly collecting that big first-year commission. You lose because twisting leaves big gaps in your coverage. Station WHO's cameras caught this guy trying to convince this supposed victim to drop Blue Cross and instead buy the insurance he was offering.

**SALESMAN:** Blue Cross and Blue Shield, now, I don't know how you feel towards them or anything else. I am going to tell you my feelings on it because I am not afraid to tell people. I call them double-cross.

**RIVERA** *[voice-over]:* Double-cross. Ten of the eleven agents stung by WHO were later charged with alleged misconduct, based on these secret videotapes.

**RIVERA:** There are 40,000 licensed insurance agents here in the State of Iowa. Half of them are registered to sell insurance to the elderly. Now, that's an awful lof of competition for an insurance agent trying to make a living and it pushes some of them into what are called abusive marketing practices. Now, that's a fancy way of saying that some of them will do or say anything—however unethical—in order to exploit their elderly customers.

**SALESMAN:** What about that maternity clause? You think you need that one?

**FLORENCE CAIN:** Yeah. I need that one very badly. [laughter]

**RIVERA:** *[voice-over]:* It is unlikely that 86-year-old Florence Cain needs insurance to pay her bills in case she were to get pregnant. Florence isn't even married. This obvious rip-off may give us a few laughs. But the whole story is more likely to make you cry. Florence is one of those grassroots Americans, born and bred in the heart of Iowa's rich farm country. She lives in a modest home on Main Street in a small town called Arnold's Park. As her closest relatives—her neice, Alice, and nephew, Jack Kibbie—told us, Florence worked all her life to

build up a nest egg to sustain her during old age. But by now, her life savings have been plundered by salesmen who dishonor the insurance industry. In Florence's case, the sign on her door was posted too late.

**ALICE KIBBIE:** There were 23 policies in 18 months issued to her.

**RIVERA:** She had taken out 23 different policies in a period of 18 months.

**ALICE KIBBIE:** That's right.

**RIVERA:** How much money was involved?

**ALICE KIBBIE:** Over $20,000.

**RIVERA:** How did you react, Jack, when you found out how many policies your aunt had taken out in her name and how much money was involved?

**JACK KIBBIE:** I couldn't believe it, you know. A person that has saved her entire life to take care of herself when she got up in years and then to have a few white-collar crooks come in the front door and in a matter of two or three years, take your entire life savings. They can get in a strange area and with their smooth talking—so they are not going to have to meet these people on the street every day. And they just go from door to door until they find a victim.

**RIVERA:** *[voice-over]:* In buying these unnecessary, overlapping, and therefore effectively worthless policies, all Florence Cain can be faulted for is believing the lies an insurance agent named George Muller told her—lies that took her to the brink of bankruptcy.

**RIVERA:** Mr. Muller, incidentally, has already surrendered his license to sell insurance in the state of Iowa. And he is under criminal indictment in another case. The fleecing of Florence Cain is the gravest example of an underhanded sales tactic called "stacking". Once an unscrupulous agent finds an easy mark,

he just keeps coming back to their home—time and time again —selling them one policy after another until—as in Florence Cain's case—the elderly victim has been taken for just about all they are worth. Stacking often involves Medicare supplement policies—insurance designed to pay part of your medical expenses—the 62 percent not covered by Medicare. It's a $5 billion-a-year business. Fifteen million elderly Americans have at least one such policy. But according to the House Select Committee on Aging, hundreds of millions of dollars supposedly spent for those Medicare supplement policies have been paid out, instead, to insurance crooks—con men who either oversell, misrepresent or just plain lie about what it is they are selling. Congressman Claude Pepper, chairman of the Committee on Aging, demonstrates a typical sales pitch.

**Rep. CLAUDE PEPPER:** He comes back next week. He says, "You know, Miss Smith, I've got just the thing for you. What would happen if you had a serious illness and Medicare didn't pay but 38 percent of your bill? What would you do?" She'd say, "I don't know what I would do. I've got a little money but it wouldn't last very long with these high doctors' bills and everything." "Well," he said, "I've got the answer for you, I've got a policy here by a big insurance company, and that policy will protect you. You just pay me a relatively small premium and you'll be protected against all these things." And then, a little while later, he comes back again. "Miss Smith, I've got something better than I had last week when I was out here for it." He sells your mother. We had an instance of an elderly lady in Illinois that had, I believe, 56—76 insurance policies. They finally—the premiums totalled up to where she had to mortgage her farm. The payments were supposed to be $15,000 a year in expense.

**RIVERA:** Embarrassment is one of the biggest obstacles preventing effective regulation or criminal prosecution of the renegade agents who sell unnecessary—or, at times, even worthless—insurance to the elderly. Old folks are just like the rest

of us. They don't like to admit when they have been taken. But when they do come forward—as this grand jury meeting here in Emmet County, Iowa shows—effective action is possible against the dregs of the insurance industry.

**PRESIDING JUDGE, Emmet County courtroom:** The indictment also states that the defendant did unlawfully obtain the property of Alma Junkermeyer by deception—

**RIVERA** *[voice-over]:* Harley Small, the insurance agent indicted by the grand jury, and several others allegedly operating illegally, were videotaped in action by 20/20, during our undercover operation, which began last winter in Iowa. We got involved after a call from a smalltown prosecutor, 36-year-old John Martins, the part-time Emmet County attorney. While speaking with elderly residents of his county, Martins found complaints of insurance rip-offs widespread. But he knew it would be tough to get successful criminal prosecutions. In court, it would be the old person's word against the insurance agent's . And, as you have seen, most of the agents are smooth talkers — while the elderly, on the other hand, often have more fragile memories and can be more easily confused on the witness stand by clever cross-examination. At Martins' request and with the cooperation of both Iowa's insurance commissin and its Department of Criminal Investigation, 20/20 set up its cameras in the homes of retirees Carl and Dagna Mathison, and Ed and Hanna Meehan — four area residents, all in their 70s, who agreed to serve as bait in the state's trap. Insurance agents were then invited to homes under state and 20/20 surveillance. Our cameras recorded them as they unethically sought to sell policies by scaring people.

**SALESMAN:** Pardon my French, if the person was a type of — a vegetable type, you know, like, you say, bedfast, and they weren't conscious of themselves or things like this, you see.

**RIVERA** *[voice-over]:* One problem with policies being sold as so-called "nursing home insurance" is simply that most are not what they claim to be.

**SALESMAN:** They call it "custodial care" It's neighborhood nursing home type thing It's custodial, where people get their meals and their doctors don't call on them or anything. It's just kind of a—

**RIVERA** *[voice-over]:* As far as we can determine, there are very, very few legitimate policies currently available that cover room and board in a nursing home. What these fellows are selling in reality are recuperative policies—good only after hospitalization and then for just limited periods of time. The fact that most policies do not cover extended nursing home care has received some publicity. So the agents just say, "Oh, it's the other guys who are doing the stealing."

**SALESMAN:** This woman over here on First Avenue South, she had one from Bankers Life and it was the same way. The only way it would pay was in a skilled nursing facility. And I told her that. And she said, "Well, the agent said it would pay here. The agent said it would pay here "Bullrip, it would pay here. We took it out there and the administrator of the nursing home said, "No, it will not pay here." I showed him this one and he said "Yes, it will." That made my sale for me. I didn't have to do any talking. He sold it for me.

**RIVERA** *[voice-over]:* Prosecutor John Martins went to Knut Mehl, director of the nursing home in question and asked about his alleged endorsement.

**KNUT MEHL:** No, that has never happened. if anybody makes statements like that, they are lying. Because I have a policy, myself, that I do not endorse any nursing home insurance policies. We have had too many policies that do not pay off. So I don't believe in them.

**RIVERA** *[voice-over];* Thirty-two-year-old Larry Gollhofer is the insurance agent who couldn't remember whether his wife's grandma had two farms or three, or whether she was in the nursing home seven years or nine. Actually, we taped him spinning so many tall tales, we half expected his nose to grow. For in-

stance, he told our undercover family that they had better buy more of his insurance because Medicare was about to be abolished.

**LARRY GOLLHOFER, Salesman:** Nothing gets in his way. He's got a bill that has already passed the House of Representatives. It's just got to go through the Senate. If it goes through teh Senate, there will— Medicare will be done away with. But the government will pay $100 a month towards your premium to take on a policy that will pay everything. They are just going to let the insurance companies handle that, as in the government.

**RIVERA** *[voice-over]:* We checked with the relevant congressional committees and with the administration and, of course, could find no serious proposals to repeal Medicare. On the 23rd of February, Mr. Golhoffer was arraigned on five felony charges involving conspiracy, theft and fraud. A sixth count alleging forgery was added later. Golhoffer, accompanied by his attorney, refused our request for an interview.

**RIVERA:** You have anything to say about it?

**RIVERA** *[voice over]:* On April 22nd, the second day of his trial, Mr. Golhoffer's attorney asked Judge Hamilton and Prosecutor John Martins to accept his plea of guilty.

**Judge HAMILTON:** There is a plea bargain between the defendant and the state in this matter—

**RIVERA** *[voice-over]:* Golhoffer pled guilty to one count of theft in the third degree in return for an agreement dropping the other charges. In all, two of the four agents videotaped by us were judged to have committed acts serious enough to lead to criminal indictments. Mr. Lauderbach is currently under a formal investigation. This kind of unethical — sometimes illegal — conduct is certainly not condoned by the mainstream of the insurance industry.

**JIM MOOREFIELD, President, Health Insurance Association of America:** But if there is any evidence — any evidence — of wrongdoing, then the company should be advised and the com-

pany should take action as they are doing and has been done, particularly in the last few years when these Medicare supplement policies, as some of the abuses that you are showing, have come to the forefront.

**RIVERA** *[voice-over]:* But Iowa's Insurance Commissioner Bruce Foudree thinks that just as there are some bad agents, there are also a few bad companies that tolerate and, at times, even encourage dishonesty.

**BRUCE FOUDREE, Iowa Insurance Commissioner:** The abusive marketing practices have been either condoned or encouraged by companies and that is something that concerns us a lot. And we are just as disturbed about that as we are with agent misconduct.

**RIVERA:** You are saying that companies actually encourage this kind of misrepresentation?

**FOUDREE:** We have seen evidence to that effect. yes.

**RIVERA** *[voice-over]:* During hearings held in 1978, the Select Committee on Aging charged several insurance companies specializing in senior citizen sales with offering policies of questionable economic value. The committee went on to say that Pioneer Life of Illinois, Certified Life of California, and Intercontinental Life of Newark, New Jersey, "... specifically teach their salesmen how to lie and cheat in order to sell as much insurance as possible to senior citizens." The companies deny any wrongdoing. Union Casualty, the company whose agents were involved in most of the cases documented by 20/20, refused repeatedly to be interviewed by us, saying only that the agents' were out on their own and that the company should not be held reponsible for their agents' alleged misconduct. The company said disciplining agents is the state's responsibility. This seems typical of a pattern uncovered by teh congressional hearing. Companies usually seek criminal prosecutions against their agents when they are caught stealing from the company, not when they are caught stealing from old people like Florence Cain.

**RIVERA:** Did you ever realize that you were spending so much of your money on all those insurance policies?

**CAIN:** No. I didn't at the time, no.

**RIVERA:** How do you feel about it, now, when you look back on it?

**CAIN:** Oh, I thought I made a fool of myself.

**RIVERA:** There is a guide available in either English or Spanish that will help you avoid some of the rotten practices we have uncovered tonight. It is a joint publication of the federal government and the National Association of Insurance Commissioners. It's free. And if you want one, just write to Medigap. their address is 632-J, Pueblo, Colorado. The zip there, 81009. Insurance fraud is a nationwide problem. Next week, we will introduce you to a group called the Missouri Renegades. You ain't seen nothin' yet, Hugh?

**DOWNS:** We look forward to that. Thank you, Geraldo.

**DOWNS** *voice-over]:* Paul Anka. He was a teenage pop music idol in the '50s. Now, he's a top star in Las Vegas and he has written nearly 700 songs. Next Bill Redeker with a profile of Paul Anka.

*[commercial break]*

**DOWNS:** For a moment, a short lesson in the recent history of pop music. [voice-over] It's a story of trends, each pushing aside the preceding one. There was the Elvis sound, pushed aside by the British sound, the Beatles, which was later drowned out by acid rock — Jimmy Hendricks, Janis Joplin and the sound of protest. Yet through it all, there has been a singer-composer who has survived — even flourished — by writing for the trendsetters and maintaining his whole middle-of-the-road commercial sound. Here to tell us about Paul Anka is Bill Redeker. Bill?

**BILL REDEKER:** Thank you, Hugh. You know, the fact is that the big draws, the big sellers of recorded music are those

who never stray far from the broadest popular taste. That's the path Paul Anka has followed from the beginning, since he was teenager, and still today.

**REDEKER** *[voice-over]:* Paul Anka. Singer and composer. A pop star of the '50s Twenty-five years later, he is still singing the same songs that originally put him in the Top Ten.

**PAUL ANKA** *voice-over]:* It's more enjoyable for me singing them now than when I was younger.

**REDEKER** *[voice-over]:* Born in Ottawa, Canada in 1941, Anka was determined to be an entertainer. But his restaurant-owner father neither recognized nor encouraged his son's talent.

**ANDREW ANKA, father:** I don't think, reminiscing back, that I detected anything that is talent— what you'd call talent, in Paul. And much to my protest — I wanted to make a journalist out of him or a lawyer. And I just couldn't get him to think in that direction.

**REDEKER** *[voice-over]:* While his father wanted him to finish school, his mother supported his ambition.

**ANKA:** I mean, there were times I would take my mother's car, at age 14, and in the dead of winter I would drive over to Quebec without a driver's license and enter amateur contests, just so I could get the experience and feel that environment of applause and that acceptance. And I would come home at 11 or 12 at night and he was still at work and never knew I had left.

**REDEKER** *[voice-over]:* Anka wrote his own songs. One was about a crush he had on a girl named Diana when he was only 15.

**ANDREW ANKA:** We used to have a young lady by the name of Diana who frequently would come up to babysit. And Paul being younger fell in love with her. And he composed a song, "Diana". She's older and, if you know the lyrics of "Diana", "You're so old and I'm so young . . ." And he sort of treasured the—

**REDEKER** *[voice-over]:* With the song, "Diana", and a hundred dollars borrowed from his father, he left Canada, headed to New York and won a recording contract. "Diana" has sold more than 10 million copies.

**REDEKER** *[voice-over]:* One year later, at age 16, Anka toured the country singing in more than 90 cities. Irvin Feld was his first manager.

**IRVIN FELD:** More than anything else. Paul wanted to be successful. He had a lot of charisma. I always told Paul, I said, "Paul, you have to be considerate of other people. Never forget your fans. Stay around. Sign autographs. If they want you for an hour, stay for the hour or whatever it is. But never forget your fans."

**REDEKER** *[voice-over]:* By the time he was 19, in 1960, Anka was a veteran of the pop music world, having produced more than a dozen Top-40 hits in only three years. As he travelled around the world, he wrote and recorded songs in five languages. In the mid-60s. Anka was a host of the television show. "Hullaballoo", but the British rock invasion was threatening a lot of young singers' careers. Yet Anka's talent as an entertainer enabled him to turn to nightclubs. In 1960, Anka began his nightclub career here at teh Sahara Hotel in Las Vegas. The 18-year-old was paid $5,000 for a one-week engagement. Twenty-one years and several las Vegas clubs later, Anka continues to perform in the top showrooms. But today, the 39-year-old entertainer earns 50 times more — or a quarter of a million dollars per week.

**REDEKER** *[voice-over]:* Anka spends ten weeks a year in Las Vegas and another ten to twenty weeks on the road, travelling from city to city in his Lear jet. Between trips, he returns home, arriving here in Monerey, California. His wife, Anne, is a former fashion model who he married 18 years ago. They live in nearby Carmel with their five daughters. His home is also where he composes, in this elaborate recording studio. The procedure is relatively straightforward.

**REDEKER:** How long does it take to write a piece?

**ANKA:** To do a very quick commercial song can take an evening. If you are writing alone, maybe sooner than that. It's always getting the melody structure down first, for me, and then working on your lyric.

**REDEKER** *[voice-over]:* Sometimes the title he picks gives him ideas for a melody.

**REDEKER:** How do today's melodies compare, and the rhythm and the lyrics, with yesterday's?

**ANKA:** Back in the '50s, we established, like, new rhythms. We had pretty well established what had to be laid down for ballads. For instance, you would always hear this [playing piano] and it was really hip, you know. You could write anything around it. [singing] *"Put your head on my shoulder . . ."* I mean, every record, I mean, people were walking around the streets with their hands going like this after a session. They'd say, "Next," and the other guy would walk in and it would be [playing piano] — and that drove you nuts for over three years.

**REDEKER:** What about your new material — the material that's in the latest album — how did you put that together?

**ANKA:** I concentrated on one ballad that I felt was very melodic and very contemporary and lyric. [playing piano and singing] *Here I go again/Trippin' on my own feet] . . .* and established my next rhyme for the following line: *Lately, it seems I've been—*

**REDEKER** *[voice-over]:* Anka's new lyrics are sophisticated: the device of natural rhyme schemes is not as easy as it sounds.

**ANKA:** So I rhyme "talk," "walk", I'll do like a one-two-three rhyme pattern. *I stumble when I try to walk/It's like I'm in a state of shock/When I'm with you* — and then going for what is a hook, here. The real—the song builds to this point, where she can really say it, into: *Think I'm in love again/When—.*

**REDEKER** *[voice-over]:* Anka feels the lyrics of his songs say something to everyone.

**ANKA:** *Look what a fool Ive been/Guess I'm in love again . . .*

**REDEKER:** And, again, all the rhyming right?

**ANKA:** And then you get the same— to get the title home and to repeat the important line — "Think I'm in love again" is always the key line.

**REDEKER** *[voice-over]:* It's a formula he's been using for 25 years, and it works. In all, Anka has written nearly 700 songs, many of them recorded by other singers, including Annette Funicello, Tom Jones, Barbra Streisand. He also wrote the opening of the "Tonight" show in 1962, which brings in $30,000 dollars a year. But without a doubt, his most memorable song is "My Way" Anka wrote the lyrics to a French melody he bought and thought it would be ideal for Frank Sinatra. Anka first heard Sinatra's recording over the telephone.

**REDEKER:** How did it sound?

**ANKA:** If it were coming through a tin can, it sounded like Mozart.

**FRANK SINATRA:** Well, actually, it was right on this stage where we're sitting now that he came in to watch a rehearsal. And he said. "I gotta see you right after you're through." And he had a music sheet under his arm. And we went back in the dressing room and the piano player played this thing for me. And I said. "It's marvelous. Where'd you get this thing?" But the next day, we recorded it. The following day, I went to Los Angeles and recorded it. And I think that the night, 1968 — somewhere like that — and it got the big joke because it became the anthem — the national anthem for the act.

**REDEKER** *[voice-over]:* Every January since 1972, Anka has conducted a telethon for cerebral palsey and has helped raise $19.5 million.

**DINA MERRILL:** She's having a baby and she wants you to sing. "Having My Baby".

**Anka:** Okay, [singing] "*You're havin' my baby/What a lovely way of sayin' how much you love me/Havin' my baby/What a lovely way of sayin' how—*

**REDEKER** *[voice-over]:* Most of his songs, including "Having My Baby" are ballads. They are commercial and designed to appeal to a broad-based audience.

**REDEKER:** How do you describe what you do musically — the types of songs you write and sing?

**ANKA:** They are people songs — pop songs. There's—

**REDEKER:** One critic told us that they are story songs.

**ANKA:** Yeah. I would say that most songs— some songs tell a story.

**ANKA** *[singing]: I've been waitin' for you all of my life/So many times I feel you holdin' me tight/And now that you're here, it's all right/I waited for you all my life ...*

**REDEKER:** How do you rank Paul as an entertainer?

**JOE DELANY:** Taking everything into consideration, he ranks in the top five.

**ANKA** *[singing]: So many times I've dreamed of holdin' you tight/And now that you're here, it's all right.*

**ANKA:** When you're on that stage, it's an experience that I wish everyone could experience once because it is a form of love, a form of feeling that is really unparalleled.

**DOWNS:** Style.

**REDEKER:** Absolutely.

**DOWNS:** Thank you, Bill. We'll be right back.

*[commercial break]*

**DOWNS:** Well, that's 20/20 for tonight. We're in touch, so you be in touch. I'm Hugh Downs. Good night.

**ABC NEWS—20/20**
Box 2020
Ansonia Station
New York, N.Y. 10023

**Transcript: May 14, 1981**

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-787

*In the*

# Supreme Court of the United States

OCTOBER TERM, 1984

---

GARO LAUDERBACK,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

DON H. REUBEN
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:
WILLIAM J. CAMPBELL, JR.
MARK SABLEMAN

Attorneys for Respondent
American Broadcasting Companies, Inc.

CHAS. P. YOUNG COMPANY

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether a broadcaster may report admittedly truthful facts concerning the activities of an insurance agent who made false representations to sell insurance to senior citizens, and then state its opinion, based upon such truthful facts, that such conduct is "rotten," "unethical," "unscrupulous" and a form of "white collar crime."

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTION PRESENTED | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| SUPPLEMENTAL STATEMENT OF CASE | 1 |
| A. State Investigations | 1 |
| B. Lauderback's False Sales Presentations | 2 |
| C. Investigations of Lauderback | 4 |
| D. ABC's Knowledge | 4 |
| E. The ABC Broadcast | 4 |
| F. Lauderback's Complaint | 5 |
| G. ABC's Summary Judgment Motion | 5 |
| ARGUMENT AGAINST ALLOWANCE OF WRIT | 6 |
| THE EIGHTH CIRCUIT APPLIED THE PROPER LEGAL STANDARD | 6 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| *Bennet* v. *Transamerican Press*, 298 F.Supp. 1013 (S.D. Iowa 1969) | 7 |
| *Foote* v. *Sarafyan*, 432 So.2d 877 (La. App. 1982) | 7 |
| *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) | 9 |
| *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970) | 7 |
| *Howell* v. *Blecharczyck*, 119 Ill.App.3d 987, 457 N.E.2d 494 (1983) | 8 |
| *Iverson* v. *Crow*, 639 S.W.2d 118 (Mo. App. 1982) | 8 |
| *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974) | 7 |
| *Lewis* v. *Time Inc.*, 710 F.2d 549 (9th Cir. 1983) | 7 |
| *National Rifle Ass'n* v. *Dayton Newspapers, Inc.*, 555 F.Supp. 1299 (S.D. Ohio 1983) | 7 |
| *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) | 6 |
| *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978) | 7, 8 |
| *Stuart* v. *Gambling Times, Inc.*, 534 F.Supp. 170 (D.N.J. 1982) | 7, 8 |
| *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867 (D.Md. 1972) | 7 |


## OTHER AUTHORITIES


| | |
|---|---|
| Iowa Administrative Code § 510.14.93 | 3 |
| Restatement (Second) of Torts § 566 (1977) | 6 |

No. 84-787

*In the*

# Supreme Court of the United States

OCTOBER TERM, 1984

---

GARO LAUDERBACK,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## SUPPLEMENTAL STATEMENT OF CASE

Petitioner's statement of the case omits relevant facts; we thus supplement Petitioner's statement.

### A. State Investigations.

In late 1980 and early 1981 two Iowa state agencies began investigating insurance agents suspected of fraudulent sales practices toward the elderly. (Jt.App. 99-101, 108.)[1] Both government agencies conducted undercover investigations;

---

[1] Record citations labeled "Jt.App." are to the Joint Designated Appendix in the Eighth Circuit. Record citations

*(footnote continued on next page)*

Respondent American Broadcasting Companies, Inc. ("ABC")[2] filmed one of these investigations at the invitation of the Iowa authorities. Lauderback was one of those under investigation and he was filmed by ABC making an insurance sales presentation to elderly persons in a "sting" operation conducted by the Emmet County, Iowa County Attorney's Office. (Jt.App. 150-151.)

**B. Lauderback's False Sales Presentations.**

During Lauderback's videotaped sales presentation to the elderly couple who acted as potential purchasers for the Emmet County Attorney, Lauderback made statements to sell insurance to this couple that he subsequently admitted below were false in fact. (Jt.App. 153-156, 194-196, 280-281, 197-98, 32.)

*False Story About "Endorsement".* Lauderback was videotaped claiming that the administrator of the largest local nursing home personally endorsed the nursing home insurance policy he was selling. Lauderback admitted in the trial court that the story was false. (Jt.App. 153.)

Lauderback conceded that he knew the representation was false when he made it, and that he knew his potential customers considered important the particular hospital administrator's endorsement of a specific insurance policy. (Jt.App. 153-156.)

Lauderback made other false statements on the ABC videotape:

> *False Assurances Regarding Regulations.* Lauderback assured the elderly couple that he knew Iowa insurance regulations. In fact, Lauderback admitted in the trial

---

*(footnote continued from preceding page)*

labeled "App." are to the Appendix to the Petition for Certiorari.

[2] ABC's only non-wholly owned subsidiary is Entertainment and Sports Programming Network (ESPN). (Sup. Ct. Rule 28.1)

court that he did *not* in fact know Iowa insurance law. (Jt.App. 313-315.) Lauderback also assured the couple that he could say with certainty that the particular policy he was selling would pay the cost for a certain nursing home while a competing policy would not. These statements about insurance coverage were also in fact false.[3]

*False Statements Regarding Blue Cross and Blue Shield.* Lauderback repeatedly and falsely claimed that the couple's present Blue Cross and Blue Shield policy would not pay for nursing home care. (Jt.App. 197-98.) It does. (Jt. App. 32.)

*Failure To Disclose Premium Increase.* Lauderback stated on the ABC tape that his policy was "guaranteed renewable for life," but did not disclose that the policy's premiums would increase with renewals—an unethical act by his own admission. (Jt.App. 194, 196, 280-281.)

*False Statements In Prior Sale.* On the videotape, Lauderback boasted concerning a prior sale of nursing home insurance he had made to an elderly woman; the Iowa authorities made inquiry concerning that prior sale. They discovered that Lauderback had made false statements of fact to the unsuspecting woman to accomplish the sale he had boasted about in the videotape. (Jt.App. 43-49, 113-117, 119-121, 123-127.)[4]

---

[3] In fact, the regulations provide exactly the opposite from what Lauderback represented: all policies had to provide equivalent coverage, and coverage could never be determined in advance but depended on the individual, not the institution. Iowa Admin. Code § 510.14.93.

[4] Lauderback falsely told this elderly customer that the policy she had would not cover at Estherville, Iowa's largest local nursing home, and failed to disclose the age limit for the policy he was selling. The customer's application for insurance was turned down as a result of the age limit, and she was left

*(footnote continued on next page)*

**C. Investigations of Lauderback.**

The Iowa Insurance Department investigated Lauderback because of the statements he made during his videotaped sales presentation. In August 1981 (shortly after the broadcast), the Iowa Insurance Department filed a proceeding against Lauderback to revoke his insurance license. (Jt.App. 31-33.)

Also, the Emmet County Attorney conducted a criminal investigation of Lauderback. The County Attorney determined that Lauderback's conduct as recorded in the videotaped sales presentation was fraudulent; however, because no sale had in fact occurred, the County Attorney determined that he could not charge criminal fraud. (Jt.App. 111, 123.)

However, the County Attorney was at the time of the broadcast considering prosecuting Lauderback for his sale to the elderly woman that Lauderback described on the videotape. This matter was pending at the time of the ABC broadcast. (Jt.App. 120-121, 123-127, 129, 133-134, 67.)

**D. ABC's Knowledge.**

Immediately prior to its broadcast, ABC knew that the state of Iowa was processing a proceeding to revoke Lauderback's insurance license and that the county attorney was considering criminal prosecution for the sale actually made. (Jt.App. 138.)

**E. The ABC Broadcast.**

The broadcast in issue on "The ABC News-Magazine 20/20" on May 14, 1981 concerned insurance fraud against the elderly and reported upon Lauderback's conduct while under investigation and the ensuing charges against him. (App. 26-36.) Lauderback was one of seven insurance agents reported in the broadcast as imposing on the elderly; the program specifically described or portrayed the activities of

---

*(footnote continued from preceding page)*

uninsured. Lauderback admitted that such conduct is unethical. (Jt.App. 205-205, 264-265, 195-196.)

six agents as well as Lauderback, and reported generally about investigations of sixteen agents. Moderator Hugh Downs introduced the broadcast by describing what was to be depicted as "unscrupulous insurance salesmen cheating the elderly." (App. 26.)

As to Lauderback, the broadcast showed his false endorsement story during the "sting" (App. 33, middle of page), followed by the denial of any such endorsement. (App. 33.) Following this, the narrator described what had happened to each of the several agents filmed in the Emmet County investigation. When the television screen showed Lauderback's photograph, the narrator said: "Mr. Lauderback is currently under a formal investigation." (App. 34.) The screen immediately changed again as the narrator spoke of "this kind of unethical—sometimes illegal—conduct" and then went on to an interview with Iowa's Insurance Commissioner and other aspects of the insurance fraud problem. (App. 34.) There was no further mention of Lauderback in the broadcast.

**F. Lauderback's Complaint.**

Lauderback did not complain of the words that were said specifically about him. He did not contend in his Complaint or deposition that the sentence "Mr. Lauderback is currently under a formal investigation" was false. (Jt.App. 8-17, 216-221.) Nor did he dispute that his endorsement story as shown on the tape was false, or that the nursing home administrator's denial was properly portrayed. (Jt.App. 152-156.)

Rather, Lauderback complained of language in the broadcast that condemns the practices of unethical insurance salesmen preying on senior citizens. In his brief below, he contended that these words "impute specific criminal or other wrongful acts to Garo Lauderback." (Pl. Supp. Br. at 7.)

**G. ABC's Summary Judgment Motion.**

ABC moved for summary judgment on two grounds: (1) all the statements of fact made about Lauderback were true and

other statements were protected as opinion, and (2) the broadcast was privileged as a report of an official government investigation. The Eighth Circuit and the District Court considered only these two issues. (App. 8.) The "actual malice" doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) *was never raised by ABC in either court below and has never been in issue here. But see* Lauderback's Pet. for Certiorari 5, 6-7, 9-10, 11-12, 12-13.

## ARGUMENT AGAINST ALLOWANCE OF WRIT

### THE EIGHTH CIRCUIT APPLIED THE PROPER LEGAL STANDARD.

We believe this case presents no issue worthy for consideration by this Court. There is no first amendment or other constitutional question raised, there is no novel or significant question of law presented, there is no claim of a conflict in the circuits, nor is there any departure from established law by the Court below, or indeed any other grounds for granting certiorari. Rather this case is simply a garden variety application of the hornbook law of comment that is so well established it is codified in the Restatement. Restatement (Second) of Torts § 566 (1977).

Moreover, the Eighth Circuit in its decision applied the well and long recognized legal standards for determining whether challenged language is fact or comment. The Court examined the language in context and as a whole to determine whether the words were fact or comment:

> We find that the *impression left by the broadcast*, that Lauderback was dealing unscrupulously with senior citizens, is more analogous to a broad, unfocused, wholly subjective comment than it is to specific accusations of felonious conduct. We conclude that *a reasonable viewer* of the 20/20 broadcast would have recognized that *inferences raised* about Lauderback's honesty or about the truthfulness of his statements were opinions and not legal conclusions. . . . We conclude that *the broadcast as a whole* may have *indicated* that ABC believed Lauderback

> to be guilty of unethical behavior. However, any representation of such was understandable as opinion and not fact.

App. 14 (emphasis added, footnote omitted).[5]

This is the traditional approach in any comment case, and language far harsher than that in issue here has been held protected using such an analysis. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970) ("blackmail"); *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974) ("traitor"); *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978) ("swindle" and "fraud"); *Lewis* v. *Time Inc.*, 710 F.2d 549, 554-56 (9th Cir. 1983) (statement that lawyer was dishonest); *Bennett* v. *Transamerican Press*, 298 F.Supp. 1013, 1015 (S.D. Iowa 1969) ("greed", "lust for money" and officials' "panting, sweating grasp for money"); *National Rifle Ass'n* v. *Dayton Newspapers, Inc.*, 555 F.Supp. 1299, 1309 (S.D. Ohio 1983) ("murders and robberies the NRA so happily encourages"); *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867, 871 (D.Md. 1972) ("coldblooded murder"); *Stuart* v. *Gambling Times, Inc.*, 534 F.Supp. 170 (D.N J. 1982) ("number one fraud"); *Foote* v. *Sarafyan*, 432 So.2d 877, 880 (La.App. 1982) (opinion that plaintiff committed crime of payroll fraud held nonactionable; "This is not a case of a naked allegation of crime but of publication of the underlying facts with substantial accuracy coupled with publication of the harsh opinion whose merit readers might decide for themselves"). These cases also make clear that there can be no *per se* rule, such as that urged by Petitioner, in which any use of words that might be used in the criminal law would necessarily be considered a statement of fact. (Pet. 17-20.) Instead the words in question must be considered in context and taken as a whole, precisely as the Eighth Circuit did below. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970) (word "blackmail" in

---

[5]The emphasized words and phrases show that the Eighth Circuit viewed the broadcast carefully, in context, in determining whether a reasonable viewer would understand the statements in issue as fact or opinion.

context held to be "no more than rhetorical hyperbole, a vigorous epithet . . .").

The Court also determined that there was in the language no inference of undisclosed defamatory facts on the ABC broadcast:

> In the instant case, the factual bases for the inferences raised about Lauderback were revealed. The videotape of Lauderback, the interview of the nursing home director, and the statement by the Insurance Commissioner regarding the sale of insurance to the elderly, in general, formed the bases of the opinions in the broadcast. No undisclosed facts existed which were necessary for the viewers to be able to independently evaluate the opinions expressed.

App. 15. *See Orr* v. *Argus-Press Co.*, 586 F.2d 1106, 1115 (6th Cir. 1978) (reporter "accurately reported the underlying facts" that were the basis for his comments); *Stuart* v. *Gambling Times Inc.*, 534 F.Supp. 170, 173 (D.N.J. 1982) (article was supported by facts upon which the writer based his opinions); *Iverson* v. *Crow*, 639 S.W.2d 118, 120 (Mo.App. 1982) ("Respondent does state facts upon which he bases his opinion. . . . Whether the opinion expressed by the author is justified by the facts stated is for the reader of the news article to decide"); *Howell* v. *Blecharczyck*, 119 Ill.App.3d 987, 457 N.E.2d 494 (1983) ("even if stated opinion is based on disclosed facts carefully and seriously selected to support the opinion, such admittedly 'biased' journalism is afforded the same constitutional protection as writing thought of as 'balanced' ").

In sum, the Eighth Circuit simply applied existing libel comment law to the instant publication and found it to be comment and therefore non-actionable. There is nothing either in the circumstances of the publication, its context, the Court's ruling or the state of the law that even remotely commends this case for a review by this Court.

Finally, the Court did not commit any of the "errors" plaintiff asserts in his Petition:

*First*, the Eighth Circuit *never* "confused" comment principles "with the constitutional actual malice privilege," as Petitioner contends. (Pet. 5-7.) That issue never arose.

*Second*, the comment privilege was correctly applied to the ABC broadcast by the Court below. ABC disclosed the facts on which its comment was based and then commented; it was not required to disclose all the facts Petitioner wanted disclosed. *See* pp. 7-8 *supra*. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). Such a rule of law urged by Petitioner is clearly unworkable and would emasculate the secured right to comment.

*Third*, the Eighth Circuit did *not* make a *per se* rule that all media investigations must be assumed to have disclosed all the underlying facts, as Petitioner contends. (Pet. 8.) Nothing in the Eighth Circuit's decision supports Petitioner's claim, and Petitioner is misreading the opinion in a transparent effort to create some semblance for review here. *See* App. 11, 15 (discussing facts ABC disclosed about Lauderback).

*Fourth*, the Eighth Circuit properly found the case appropriate for summary judgment. Petitioner's contention that there were jury issues on whether ABC was "negligent" is unfounded. (Pet. 9-10.) ABC's "negligence" was never in issue in the District Court or the Eighth Circuit. The legal issues raised by ABC were that the language was opinion as a matter of law, an exercise of official report privilege, and truthful as a matter of law. All of the cases Petitioner cites concerning triable jury issues involve disputed facts and there is no material issue between the parties as to the relevant and decisional facts here. (Pet. 10-15.)

## CONCLUSION

The Eighth Circuit decision is a straight-forward application of established principles of libel law. The decision below presents no conflict in the circuits, departure from existing law, or issue of special importance. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

DON H. REUBEN
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:
WILLIAM J. CAMPBELL, JR.
MARK SABLEMAN

Attorneys for Respondent
American Broadcasting Companies, Inc.